Indiana Law Review

Volume 9 June 1976 Number 5

The Indianapolis Experience: The Anatomy of a Desegregation Case*

WILLIAM E. MARSH**

I. BACKGROUND TO THE LITIGATION

A. *Brief History of Segregated Schools in Indianapolis*

The first opinion written by United States District Judge S. Hugh Dillin on desegregation[1] detailed a history of segregated public schools in Indianapolis. Prior to 1869, Indiana state law prohibited blacks from attending public schools,[2] and the Indianapolis Public Schools (IPS) enforced the state law.[3] Following the ratification of the fourteenth amendment to the United States Constitution in 1868, Indiana law was amended to permit blacks to attend public schools.[4] However, the Indiana Supreme Court held that the new law did not entitle black students to attend school unless a black public school was available in the district; the law did not entitle black students to attend the white (public) schools.[5] The policy of separate schools required by state law prevailed throughout Indiana until it was officially abolished by the Indiana General Assembly in 1949.[6]

In accord with the state law, IPS adopted a dual system of public education in 1869.[7] Therefore, until the state law was

**Associate Professor of Law, Indiana University School of Law—Indianapolis. B.S., University of Nebraska, 1965; J.D., 1968.

[1]United States v. Board of School Comm'rs, 332 F. Supp. 655 (S.D. Ind. 1971), *aff'd*, 474 F.2d 81 (7th Cir.), *cert. denied*, 413 U.S. 920 (1973).

[2]The Supreme Court of Indiana held that a person was eligible for admission to public school only if he were between the ages of 5 and 21, unmarried; and neither a negro, a mulatto, nor the son of a mulatto. Draper v. Cambridge, 20 Ind. 268 (1863).

[3]332 F. Supp. at 664.

[4]Ch. 16, § 2, [1869] Ind. Acts 41 (repealed 1949).

[5]Cory v. Carter, 48 Ind. 327 (1874).

[6]Ch. 186, § 1, [1949] Ind. Acts 603 (repealed 1973).

[7]Indianapolis Public Schools implemented its dual system by building a new school house for the white students and assigning the black students to the old school building.

changed in 1949, segregated public education was the official policy in Indianapolis. Moreover, Judge Dillin found that the dual system was maintained in fact long after 1949 and after *Brown v. Board of Education*[8] in 1954.[9]

The dual school system was extended to the high school level in Indianapolis in 1927, when Crispus Attucks High School was opened as an all-black school. Prior to 1927, blacks attended their neighborhood high school, but in 1927 all black students were required to attend Crispus Attucks. Several forces were instrumental in the creation of this new school. In 1922, the Indianapolis Chamber of Commerce petitioned the school board to construct an all-black school, and that same year the school board passed a resolution creating the school.[10] Also, at least part of the black community supported the construction of Crispus Attucks because it created jobs for black teachers, who at that time were not permitted to teach in high schools.[11]

Busing was an issue identifiable with Crispus Attucks since its inception, but the issue debated in 1927 was not the same one that is controversial today. The issue then was whether IPS should provide transportation to black students being reassigned to Crispus Attucks from the high school nearest their homes. IPS resolved that there would be no busing. If black students wanted to attend high school, they not only had to attend Crispus Attucks but also had to provide their own transportation. Many Attucks students rode the street car to school, a journey which often required transfers and lasted up to 45 minutes each way.[12]

Until the 1930's the IPS Board of School Commissioners was elected in a partisan political election. For a time in the 1920's, the Republican Party was the dominant force in Indiana politics, and the Ku Klux Klan was a dominant force in the Republican Party.[13] To remove this "Ku Klux Klanism" of the school board, leaders of the Indianapolis community in 1929 obtained enactment of legislation removing partisan politics from school board elections and contemporaneously formed an elitist candidate slating com-

---

[8]347 U.S. 483 (1954) [hereinafter cited as Brown I].

[9]"In short, nothing really changed during the 1954-1968 period, and the Indianapolis school system . . . remained segregated by operation of law." 332 F. Supp. at 670.

[10]*Id.* at 664.

[11]Thornbrough, *Segregation in Indiana During the Klan Era of the 1920's*, 47 MISS. VALLEY HIST. REV. 594, 601 (1961).

[12]Direct Exam of Alexander Moore, July 12, 1971. In 1971 Moore was IPS Assistant Sup't in charge of curriculum supervision. Record, vol. 1, at 150-51, 170.

[13]J. NIBLACK, THE LIFE AND TIMES OF A HOOSIER JUDGE 191 (1973) [hereinafter cited as NIBLACK].

mittee, the Citizens School Committee.[14] One of the founders of the committee, and the apparent leader for some 40 years thereafter, was John L. Niblack, the Republican Circuit Court Judge of Marion County, Indiana from 1947 until 1975.[15]

Since its formation, the Citizens School Committee has maintained nearly absolute control over the selection of members of the Board of School Commissioners. The Citizens School Committee's entire slate was elected to the board in every election from the formation of the committee in 1929 until 1964, when the first person from an opposition slate was elected.[16]

While it is clear that the Citizens School Committee has dominated the selection of school board members, there is no evidence that the school board itself, once elected, has been controlled or influenced by the committee. The stated philosophy of the committee is to select leading members of the community for election to the school board, to campaign for election of those people, and after their election to provide them complete independence in the operation of the schools.[17] This philosophy is prompted by the fact that members of the school board rarely serve more than one 4-year term.[18]

When the 1947 session of the Indiana General Assembly attempted to repeal the state law requiring segregated schools, the Board of School Commissioners ordered its superintendent to appear before the legislature and testify in opposition to the proposed legislation,[19] ostensibly because, in the judgment of the board, the legislation did not permit a phasing out of the dual school system but required an immediate elimination of segregated schools.[20] The 1947 bill failed to pass, but in 1949 the Indiana General Assembly enacted legislation which required desegregation of all Indiana's public schools.[21]

---

[14] *Id.* at 331-32.

[15] *Id.* at 332.

[16] *Id.*

[17] *Id.;* confidential personal interview. [In preparing this study, the author interviewed many persons associated with the litigation, who asked not to be quoted. In order to differentiate information gleaned from these interviews from the author's own opinions such information will be cited to "confidential personal interview" where necessary.]

[18] In 1972 the Citizens School Committee merged, for purposes of slating candidates, with Citizens of Indianapolis for Quality Schools and slated a group of candidates as the Committee for Neighborhoods Schools (CNS). NIBLACK at 333. In 1976, three of the incumbent board members, each of whom had been slated by CNS in 1972, ran for reelection but without the support of CNS.

[19] 332 F. Supp. at 665.

[20] Confidential personal interview.

[21] Ch. 186, §§ 1-11, [1949] Ind. Acts 603 (repealed 1973).

In response to this legislation, IPS in 1953 reestablished the elementary school district boundaries.[22] At the 1971 school desegregation trial, IPS asserted that the 1953 boundaries were racially neutral and that the segregated schools which arose resulted from the boundaries selected following the segregated housing patterns in the city. Judge Dillin found that "[n]ot only did the Board not attempt to promote desegregation,"[23] but several aspects of the process of reestablishing the boundaries in 1953 would have been, if committed after *Brown I*, unlawful acts of de jure segregation.[24]

The 1953 plan provided optional attendance zones for the occasional integrated neighborhood.[25] Students in these neighborhoods could attend their choice of two schools, typically one black and one white. For whatever reason, these students almost always attended the school which was identified with their race.[26] The boundaries were based in part on a 1952 census of school children in which IPS, for no ascertainable reason, recorded the race of each child.[27] The 1953 boundaries were also partially based on the 1949 boundaries which were admittedly based on race.[28]. In some instances the lines drawn reflected residential segregation and ignored natural boundaries, requiring students to cross a canal, railroad track or arterial street to get to their assigned school where no such impediment stood between the student and an adjoining school.[29]

B. Prior School Desegregation Litigation

The plaintiff in *Cory v. Carter*,[30] a black parent of school-age children, resided in Lawrence Township in Marion County. The Lawrence Township school district did not have a black school and refused to accept the plaintiff's children as students at the white public school. The Indiana Supreme Court, in finding this action to be consistent with the Indiana and United States Constitutions,

---

[22]There have been a large number of minor changes since 1953, but the basic plan is still used in 1976. In 1971, Judge Dillin found that "[a]ccording to the evidence, there have been approximately 350 boundary changes in the system since 1954. More than 90% of these promoted segregation." 332 F. Supp. at 670.

[23]*Id.* at 666.

[24]*Id.*

[25]*Id.*

[26]Direct exam of Alexander Moore, July 13, 1971. Record, vol. II, at 246.

[27]Direct exam of Paul I. Miller, July 13, 1971. Record, vol. II, at 314-15. Mr. Miller was IPS Ass't Sup't for elementary education in 1971.

[28]Redirect exam of Paul I. Miller, July 15, 1971. Record, vol. IV, at 778-79.

[29]332 F. Supp. at 666 & n.54.

[30]48 Ind. 327 (1874).

including the reconstruction amendments, held that the defendant's failure to provide a black school, as required by the 1869 state statute, did not entitle the black children to attend a white school.[31]

At the time IPS was preparing to construct Crispus Attucks High School, a lawsuit was commenced to stop construction of the school on the theory that a single all-black school could not possibly provide an educational program equal to that provided white students in the existing three specialized high schools, "technical, manual and classical and academic."[32] The Indiana Supreme Court refused to halt the project, saying that the lawsuit was premature: "When some colored child who is sufficiently advanced demands and is denied educational advantages accorded white children of equal advancement, then it will be time enough to take such proceedings as are necessary to secure the constitutional rights of such child."[33]

Mr. Arthur Boone, a black man, testified at the 1971 trial that he filed suit in 1952 to obtain a transfer of his children from School 64, the all-black school to which they were assigned to School 21,[34] which was 75 percent white.[35] The white school apparently was closer to his home, and his children had to cross railroad tracks to get to the black school. The only portion of the black school's district from which children had to cross the railroad tracks to get to school was a small pocket of three short streets where almost all of the residents were black. The suit was brought after a child was killed crossing the railroad tracks to get to school and after Mr. Boone had petitioned the school principal and the IPS central administration for a transfer of schools for his children.[36] Mr. Boone testified at the 1971 desegregation trial that when he filed his lawsuit there were only two white children on his block and that they both attended School 21.[37] The state court records do not reveal the outcome of the case, but Mr. Boone testified that his children always attended School 64, and that white children on his block always attended School 21.[38] Government counsel told the court they were unable to locate the records of the trial.[39] When

[31] *Id.* at 334-66.

[32] Greathouse v. Board of School Comm'rs, 198 Ind. 95, 99, 151 N.E. 411, 412 (1926).

[33] *Id.* at 107, 151 N.E. at 415.

[34] Direct exam of Arthur Boone, July 13, 1971. Record, vol. IV, at 790-96.

[35] Plaintiff's Exhibit 1, United States v. Board of School Comm'rs, 332 F. Supp. 655 (S.D. Ind. 1971).

[36] Direct exam of Arthur Boone, July 13, 1971. Record, vol. IV, at 792-93.

[37] *Id.* at 792.

[38] *Id.* at 794.

[39] Statement of Mr. John D. Leshy, July 16, 1971. Record, vol. V, at 967. The statement was made during the direct exam of Patrick Chavis, Jr., one

they attempted to offer evidence from Mr. Boone's lawyer, presumably to show that Mr. Boone's lawsuit was unsuccessful, the lawyer was not permitted to testify about the case because of the best evidence rule.[40] Defense counsel implied that a trial was held and that the court held against Mr. Boone.[41]

Two administrative agencies were interested in the racial composition of IPS prior to the filing of the lawsuit, but apparently neither had any significant impact. The Indiana Civil Rights Commission adopted a resolution in November of 1967 urging the Board of School Commissioners of the Indianapolis Public Schools to make an effort to obtain a more favorable racial balance in the schools.[42] The resolution specifically sought action regarding several overcrowded schools which had large black enrollments and which were in close proximity to all-white schools which had space available.[43] The Indianapolis Mayor's Commission on Human Rights publicly indicated a concern about the racial policies and composition of the IPS and apparently conducted an investigation.[44] Neither agency, however, took any action which had the force of law or which appears to have had any effect on the policies and practices of the school board.

C. Prelude to the Litigation

The Indianapolis Metropolitan Council of the National Association for the Advancement of Colored People (NAACP), acting principally through its president, Andrew W. Ramsey, was the moving force behind the Justice Department's initiation of the lawsuit. Ramsey, now deceased, was a past president of the Indiana NAACP and a school teacher at IPS Shortridge and Crispus Attucks High Schools. In 1968 he was president of a local of the American Federation of Teachers. Ramsey claimed credit for obtaining the formal complaint to the Justice Department from the parents of a black school child,[45] a technical requirement of the Civil Rights Act of 1964.[46] The complaining parent has never been publicly identified. In March of 1967, the NAACP publicly an-

---

attorney for Mr. Boone in his 1952 action, in an attempt to get oral evidence of the hearing admitted over defense objection.

[40] *Id.* at 967-68.

[41] Cross exam of Mr. Patrick Chavis, July 16, 1971. Record, vol. V, at 969.

[42] Indianapolis Star, Nov. 17, 1967, at 23, col. 2 [hereinafter cited as Star].

[43] *Id.* Schools involved were 1, 66, 71, 73 & 86.

[44] Star, Aug. 23, 1968, at 32, col. 8.

[45] Indianapolis News, June 17, 1968, at 4, col. 2. [hereinafter cited as News].

[46] 42 U.S.C. § 2000c-6 (1970).

nounced its efforts to seek the Justice Department's intervention.[47]

The Justice Department conducted an investigation and concluded that IPS was guilty of unlawful segregation. In a letter to the IPS Board dated April 18, 1967, an Assistant Attorney General of the Civil Rights Division advised the board that suit would be filed unless corrective action was taken by May 6, 1968.[48] The president of the IPS Board of School Commissioners responded to the letter with a letter dated April 26, 1968,[49] denying the allegations of unlawful segregation and insisting that Indianapolis "has been in the forefront of progress in achieving equal treatment for all races in our schools."[50] The letter cited the official IPS policy adopted in a resolution on March 12, 1968: The policy commits the board to apparently conflicting objectives—neighborhood schools and integrated schools.[51] The letter emphasized the fact that

---

[47]Star, Aug. 23, 1968, at 32, col. 8.

[48]Indianapolis Board of School Commissioners, Minutes, Book iii, at 2053 (1967-68) [hereinafter cited as Minutes]. *See also* Star, Apr. 27, 1968, at 25, col. 4.

[49]Minutes, Book iii, at 2058.

[50]*Id.* at 2059.

[51]

STATEMENT OF POLICY ON INTEGRATION
BY
THE BOARD OF SCHOOL COMMISSIONERS
OF THE CITY OF INDIANAPOLIS

The Board of School Commissioners is but one of many governmental and private agencies which may influence the opportunity and growth of Indianapolis and of each of its citizens. We look forward to a time when every religious, racial, and ethnic group in our city is integrated in a city which knows no formal or informal bars to the enjoyment of full opportunity and choice by every citizen. At present, housing restrictions, certain inequalities of job opportunity, legacies of history, unfounded prejudice, and considerable self-segregation by groups in our city stand in the way of an integrated, unified city. The Board of School Commissioners is not empowered nor is it capable of removing all of these barriers. The Board is privileged to affirm that it is willing to work with civil government, private agencies, and all men of good will to effect an integrated, unified society.

We believe in the concept of the neighborhood school, by which we mean a school district with boundaries based on factors of geography, available transportation, and broad social composition—a concept which would promote integration in the school system.

We believe that both certificated and non-certificated personnel must be employed on the basis of needs of the system and qualifications of the applicants. Our administration should examine employment practices frequently to make certain that they are fair. Our assignment practices should be examined frequently to make certain they foster integration.

the deadline which the Justice Department established for school board action was the day before the scheduled school board election and called the deadline very "unfortunate timing."[52] The board president was quoted by the newspaper as saying, "I certainly cannot say it was politically connected, but I do have to wonder."[53] In any event, racial integration was not a major issue in the 1968 school board campaign.

The only concrete action taken in response to the Justice Department's letter was a school board resolution on May 14, 1968, ordering the superintendent to submit a plan for voluntary integration of the faculties.[54] The resulting plan, which was reported to the board on May 23, 1968, called for each school principal to request voluntary transfers from teachers for the purpose of obtaining a racial mixture of the segregated faculties. The plan provided that a request for a transfer by a teacher pursuant to the plan would be viewed positively in future consideration for promotion in that it would indicate that the teacher desired to obtain a broader experience.[55] No other encouragement, consideration, or coercion was provided: the plan was largely unsuccessful.[56]

II. The Lawsuit

A. The Complaint

Pursuant to the Civil Rights Act of 1964,[57] the Department of Justice filed suit in the United States District Court for the Southern District of Indiana on May 31, 1968.[58] The named defendants were the Board of School Commissioners of the City of Indianapolis, Indiana; George F. Ostheimer, Superintendent of Schools; Mark W. Gray, President of the Board of School Commissioners; and the other six members of the Board of School Commissioners.[59]

> We believe that a high quality of educational environment should be provided for all students. In stating this aim, we affirm our intent to search for and to recognize obstacles to student progress and to provide a variety of approaches and services which are necessary to remove these obstacles.

Id. at 1453 (statement of policy issued 3-12-68).

[52] *Id.* at 2059.

[53] Star, Apr. 27, 1968, at 25, col. 4.

[54] Minutes, Book iii, at 2052.

[55] *Id.* at 2116.

[56] On August 5, 1968, IPS and the United States stipulated to a judgment for a plan to desegregate faculty and staff. As of August 18, 1968, volunteer transfers amounted to 15 percent of those needed to implement the plan. Star, Aug. 18, 1968, at 21, col. 1.

[57] 42 U.S.C. § 2000c *et seq.* (1970).

[58] 332 F. Supp. at 656.

[59] These other six members were: Mrs. John Alexander, Sammy Dotlich,

The complaint charged the defendants with unlawful racial discrimination by segregating students on the basis of race,[60] by assigning faculty and staff on the basis of race,[61] and by constructing and maintaining Crispus Attucks High School as a racially segregated school.[62]

The complaint alleged that "[t]he defendants have refused to take reasonable steps to correct the effects of its policies and practices of racial discrimination,"[63] and that as a result of these policies and practices, "the defendants have denied Negro students in the Indianapolis Public School System of the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States."[64] The complaint stated that the Attorney General had received a complaint signed by a parent of minor negro children attending school in the Indianapolis Public Schools system and that the children were being denied equal protection of the law because of the dual school system.[65] The com-

---

Marvin B. Lewallen, L. Robert Mottern, Mrs. Gertrude J. Page, and John C. Ruckelshaus.

[60]With respect to this charge, the complaint read as follows: "Assigning students, designing attendance zones for elementary schools, establishing feeder patterns to secondary schools, and constructing new schools on the basis of policies and practices which in some instances have the purpose and effect of segregating students on the basis of race." Complaint at 2, ¶ 9(a).

[61]With respect to this change, the complaint read as follows: "Assigning faculty and staff members among the various schools of the Indianapolis School System on a racially segregated basis so that as a general practice white faculty and staff members have been assigned on the basis of their race to schools attended only or almost entirely by white students and Negro faculty and staff members have been assigned on the basis of race to schools attended only or almost entirely by Negro students." Complaint at 3, ¶ 9(b).

[62]With respect to this charge, the complaint read as follows: "Pursuant to the policies and practices of racial discrimination described in the preceeding paragraphs, Crispus Attucks High School, which was built as an all-Negro school, has been maintained as a racially segregated school ever since, attended solely by Negro students and staffed almost entirely by Negro teachers, sixteen elementary and junior high schools are attended solely or predominantly by Negro students and staffed solely or predominantly by Negro teachers, and sixty-eight schools, both elementary schools and senior high schools, are attended solely or predominantly by white students and are staffed solely or predominantly by white teachers. There are 107 elementary schools, 5 junior high schools, and 11 senior high schools in the Indianapolis public school system." Complaint at 3, ¶ 10.

[63]Complaint at 3, ¶ 11.

[64]Complaint at 4, ¶ 12.

[65]Complaint at 4, ¶ 13. This allegation was supported by a separate document, a certificate of Ramsey Clark, the Attorney General of the United States, certifying that he had received the complaint as is required by statute. *See* 42 U.S.C. § 2000c-6(a)(1) (1970).

plaint asked the court to order the elimination of the alleged discriminatory practices.[66]

B. The Answer

The answer was filed on June 19, 1968,[67] and conceded that racial segregation at one time prevailed in the Indianapolis Public Schools but denied that any racial discrimination had occurred since 1949. The answer asserted that in 1968 "students are assigned, attendance zones designed, feeder patterns established, new schools constructed, and faculty and staff members assigned solely on the basis of sound nonracial educational principles and neighborhood considerations."[68] The answer affirmed that Crispus Attucks High School was built in 1927 as an all-negro school but alleged that the school has not been maintained as a racially segregated school for "many years."[69] The answer stated that the racial balance of teachers and students in each school generally reflected the racial composition of neighborhoods surrounding the school and that any racial imbalance resulted primarily from residential housing patterns or the private choice of the individual faculty members and students.[70]

The answer affirmatively alleged the following facts: The defendants had been operating a unitary school system for more than 20 years;[71] the unitary system was established prior to the 1949 Indiana legislation requiring desegregation of public schools and prior to the United States Supreme Court decision in *Brown I*;[72] the school district had taken affirmative steps to provide com-

---

[66]

> WHEREFORE, the United States prays that this Court enter an order enjoining the defendants, their agents, officers, employees, successors, and all persons in active concert or participation with them for discriminating on the basis of race or color in the operation of the Indiana Public School System and from failing to adopt and implement a plan for the elimination of the aforementioned discriminatory practices in the Indianapolis Public School System in compliance with the Fourteenth Amendment to the United States Constitution.
>
> The United States further prays that this Court grant such additional relief as the needs of justice may require, including the costs and disbursements of this action.

Complaint at 4-5.

[67]United States District Court for the Southern District of Indiana, Cause Number IP 68-C-225. Answer.

[68]*Id.* at 1.

[69]*Id.* at 2.

[70]*Id.*

[71]*Id.*

[72]*Id.*

pensatory education on a nonracial basis for inner-city children and the program had benefited principally negro children;[73] to

> verify and maintain the defendant's objectivity in drawing attendance zones to implement the neighborhood school concept, the defendants are voluntarily seeking to employ impartial agencies outside the Indianapolis public school system to study the attendance zones;[74]

the school system had requested voluntary teacher transfers to achieve a wider distribution of faculty and staff of every race and that more than 100 applications for voluntary transfer for the upcoming 1968-69 school year had been received;[75] and "the defendants seek to afford every pupil in the public school system a superior educational opportunity completely without regard to race, color, or national origin."[76]

C. Early Defense Strategy

The general denial of racial segregation, albeit an appropriate pleading, did not candidly state the reaction of the defendants and their legal counsel to the complaint. The initial decision of defense strategy was to divide the controversy into three distinct categories: teachers, high school students, and elementary school students.[77] On the basis of this analysis, the school board apparently decided first to attempt to eliminate the racial identification of schools by faculty and staff, second to resolve the racial imbalance in the high schools, and last to *consider* the issues with respect to elementary schools.

The school board members and their lawyers believed their legal responsibilities and the practicalities of eliminating segregation as required by law dictated an individual consideration of each of these three aspects of the case.[78]

Almost all IPS schools in 1968 were racially identifiable by faculty. A stipulation between the parties, filed on August 5, 1968, shows that there were 18 schools in the IPS system with black principals. Of these 18 schools, 17 had at least 97 percent black students (14 had 99 percent or more black students and none of the 18 had less than 91 percent black students). Eleven of 18 schools with black principals had all black teachers, and in only 1 of the 18 were less than 92 percent of the teachers black.[79]

---

[73] *Id.* at 2-3.
[74] *Id.* at 3.
[75] *Id.*
[76] *Id.*
[77] Confidential personal interviews.
[78] *Id.*
[79] Stipulation No. IX at 2 (filed Aug. 5, 1968).

The school board, on advice of counsel, concluded that the existing racial imbalance of teachers could not be defended legally.[80] In addition, the board members felt that as a political matter the assignment of teachers could be altered and the racial identification of schools by faculty eliminated much more easily than with respect to the student issues. The voluntary transfer plan had not resulted in enough voluntary transfers to eliminate the racial identification of schools and did not satisfy Justice Department attorneys. On July 14, 1968, the Justice Department filed a motion for a preliminary injunction as to the teacher assignments. This motion required the defendants to treat the assignment of teachers as a priority issue; it asked the court to order substantial reassignments before school opened in September of 1968.

The combination of the Government's pressure and the school board's view of the teacher portion of the law suit resulted in an out of court settlement with respect to teacher assignments. During the settlement process, Judge Dillin acted as a mediator through a series of pretrial conferences with counsel.[81] The IPS Board of Commissioners approved the settlement on July 30, 1968,[82] and its resolution was the basis for the stipulated judgment entered by the court on August 5, 1968. The judgment technically granted the Justice Department's motion for a preliminary injunction ordering reassignment of teachers. The plan required assignment of at least 83 white teachers to the 16 all-black schools and required all schools to have at least one black regular classroom teacher for the 1968-69 school year. The settlement still left the black schools with three to four times as many black teachers as white teachers.

D. The Teachers Become Involved

The teacher transfer plan was not favorably received by the teachers. One former board member told this writer that the board received little support from the teachers "to do the right thing."[83] In 1968 the teachers' organizations were not strong. There was no collective bargaining and the teachers' organizations were not active participants in the management of the school system. The Indianapolis Education Association [IEA], the leading but not exclusive teacher representative organization, was suffering the common academic identity problem of deciding

[80]Confidential personal interview.

[81]Confidential personal interviews.

[82]Resolution Number 5851-1968, Indianapolis Board of School Commissioners, Minutes, Book jjj at 257 (1968).

[83]Confidential personal interview.

whether it wanted to be a union or a professional association.[84] The dissatisfaction of many teachers with the teacher transfer program caused the organization to become more active and militant, and for the first time the leaders and members viewed the organization as a union.

The IEA apparently was not represented by counsel on a regular basis at the time the controversy arose in August of 1968. IEA specially retained an Indianapolis lawyer with labor relations experience as part of its response to the teacher transfer program. The attorney advised the IEA members that in order to be effective, *i.e.* to have any impact on the plan, they must view themselves as a union and be prepared to take strong measures, including litigation if necessary.[85] The IEA did take legal action in an effort to block the teacher transfer program. After an informal conference with Judge Dillin, IEA's counsel, concluding he could not successfully intervene in the pending school desegregation case,[86] filed a separate action in the Superior Court of Marion County, Indiana.[87] The complaint alleged that the teacher transfer program was a violation of the teachers' rights to due process of law.[88] The suit did not stop the teacher transfer program, but it did enable the IEA to take part in the formulation of the plan. The attorney engaged in lengthy negotiation sessions with representatives of IPS and their attorneys, and the IEA participated in the actual reassignment of teachers after the plan was approved.

One of the results of the negotiations was that the IEA and its attorney came to better understand the postion of IPS regarding the teacher transfers. Ultimately they decided to discontinue the active pursuit of the action in the Indiana state court.[89] At the conclusion of these sessions, counsel for the IEA felt that he had not been given a completely accurate understanding of the situation at the time the suit was filed and that perhaps his clients, the operating board of the IEA, had also not accurately understood the situation.[90] This suggests that more effective communi-

---

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] U.S. CONST. amend. XIV, § 1.

[89] If the lawsuit had ever reached the point where it posed a real threat of interfering with the teacher transfer plan it would surely have been transferred to federal court. In May 1969, John L. Niblack, Judge, Marion County Circuit Court, in a separate case brought by individual teachers, issued a temporary restraining order against mandatory teacher transfers for racial balance. This case was removed to United States District Court by IPS. Star, May 14, 1969, at 12, col. 4.

[90] Confidential personal interview.

cations between IPS and the teachers may have avoided the teachers' suit.

One of the side effects of the school desegregation case was to substantially strengthen the posture of the teachers as a group. The teachers came to view their organization as a union and themselves as union members, and they expected organizational leaders to take actions on their behalf which they previously would have felt were inconsistent with their concept of professionalism. In addition, the negotiation between the IEA Board and IPS Board established a precedent which undoubtedly played a role in the subsequent establishment of collective bargaining between the teachers, presently represented by IEA, and IPS.[91]

The resolution of the dispute between the teachers and IPS did not indicate that all of the teachers were willing to be reassigned. A sizable number of teachers left the IPS system rather than be transferred to a different school, and the school system experienced a teacher shortage when schools opened in the fall of 1968. The *Indianapolis Star* reported that at least 36 teachers who were scheduled to be transferred to new schools resigned rather than be transferred.[92] The article stated that at least 12 of these teachers found jobs in the Indianapolis suburban school districts. It was reported that school opened in the fall of 1968 with approximately 170 substitute teachers in the classroom compared to 70 in preceding years.[93]

The teacher transfer program also had an undesired and unexpected impact on the black schools. The plan contemplated that transferred teachers would be replaced by teachers of equal experi-

---

[91]IEA again became an active participant in the desegregation process in 1974. On April 19, 1974, IEA petitioned to intervene as a party plaintiff. IP 68-C-225, United States District Court for the Southern District of Indiana. IEA sought to intervene to represent the interests of its members who were threatened with losing many jobs. In the summer of 1974, Judge Dillin had under consideration several proposed interdistrict remedies which contemplated transfer of a sizeable number of students out of IPS. IPS publicly announced its intention to terminate 1,000 teachers because of the decreased enrollment. Judge Dillin did not rule on the petition to intervene, effectively denying IEA an opportunity to participate. No interdistrict plan was implemented in 1974, and all threatened teachers were rehired. The court denied the motion to intervene on March 18, 1975, 11 months after it was filed.

When Judge Dillin ordered an interdistrict remedy on August 1, 1975, IEA renewed its motion to intervene. On August 8, 1975, Judge William E. Steckler, Chief Judge of the United States District Court for the Southern District of Indiana, acting in the absence of Judge Dillin, granted the IEA leave to intervene as a party plaintiff.

[92]Star, Sept. 4, 1968, at 23, col. 4; *see also* News, Sept. 5, 1968, at 27, col. 4.

[93]*Id.*

ence and level of competence. This part of the plan was frustrated by the numerous resignations of teachers scheduled to be transferred. The result, at least at Crispus Attucks High School (then an all-black school), was that experienced black teachers were transferred out of Crispus Attucks and replaced by inexperienced white teachers, because many experienced white teachers refused to be transferred to Attucks.[94]

It has been reported that the integration of a faculty did not go any further than reassigning teachers to previously racially identifiable schools. At Crispus Attucks High School, for example, the faculty did not become integrated in fact; rather the result was to create factions of teachers of different races in one building. At least in the early years of the transfer program, there was very little actual integration and interplay between the white teachers and the black teachers.[95]

The teacher controversy had one other side effect which has had a lasting impact on the school system. Active parent teacher association support of teachers scheduled for transfer from Northwest High School, a predominantly white school, evolved into an organization called Citizens of Indianapolis for Quality Schools, Inc. (CIQS), a conservative white organization. CIQS intervened in the case as a party defendant, aligning itself with the Indianapolis Public Schools,[96] because its members believed that IPS was not forceful enough in resisting the efforts of the Justice Department. After unsuccessfully running a slate of candidates in the 1968 school board election, CIQS merged with the previously dominant Citizens School Committee to slate a conservative anti-integration slate of candidates for the school board in the 1972 election. This slate was elected—the members of the slate, including one CIQS officer, are now the members of Indianapolis School Board and defendants in the school desegregation case.

---

[94]Judge Niblack reports that "[t]he president of the student body of Crispus Attucks, our all colored High School which had brought fame to the city, a lad named Crenshaw appeared before the board [of school commissioners] to protest transfer of 38 Negro teachers of long standing out of Crispus Attucks, to be replaced by 38 white strangers." NIBLACK at 332.

[95]Confidential personal interview.

[96]CIQS moved to intervene on February 6, 1970. Judge Dillin denied the motion on April 29, 1971, more than 14 months after the motion was filed.

CIQS appealed to the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit held that the district judge had not abused his discretion in denying intervention but that in light of subsequent developments, the court should reconsider the motion. United States v. Board of School Comm'rs, 466 F.2d 573 (7th Cir. 1972). On remand, Judge Dillin reconsidered the motion and on September 13, 1972, granted CIQS leave to intervene.

E. Attempts at Voluntary Desegregation

Following the resolution of the faculty imbalance aspect of the lawsuit, the IPS Board turned its attention to the high school phase of the case. IPS continued to consider the high schools and the elementary schools as two distinct problems. It approached the high school issue first because board members had less confidence in their legal position regarding the high schools and because the opposition to transportation of high school students was not as firm as the opposition to transportation of elementary students.[97]

After much deliberation the school board arrived at a proposal for desegregating the system's 11 high schools. The core of the plan was to close the two high schools located in predominantly black neighborhoods and desegregate the student bodies of the remaining high schools in the system by transporting the black students to those nine white high schools. The two high schools which would be closed were Crispus Attucks High School and Shortridge High School.[98]

Crispus Attucks High School had always been the black high school in the city. Even after changes in the law in 1949 and 1954, Attucks continued to attract black students from all over the city. For a time a freedom of choice plan was in effect which made Attucks an open school, permitting any student from anywhere in the city to attend Attucks. Many black students from outside the Attucks territory exercised their option to attend Attucks.[99]

The proposal to close Crispus Attucks was challenged vociferously by the black community. A coalition formed to oppose closing Attucks, Concerned Citizens for Crispus Attucks High School, brought together all segments of the black community, from Black Panthers to the most conservative members of the community. The coalition primarily petitioned the school board to retain the tradition of Crispus Attucks High School. The initial response of the school board was to proceed with its plan to close the existing Attucks facility but to preserve the Attucks heritage by building a new Attucks high school. The existing Attucks physical plant is over 40 years old and is located in a neighborhood that has been gutted of students by an interstate highway which passes the front door of the building.

This approach was not opposed by any significant segment in the black community, but the school board was unable to implement the plan. Several possible sites were selected for the new

[97]Confidential personal interviews.

[98]*Id.*

[99]*Id.*

high school. Plans for a new Crispus Attucks appeared near fruition when the IPS Board abruptly rejected the site under consideration.[100] This action came at the July 1970 meeting of the IPS Board, less than a month after a change in membership on the board.[101] Another site considered was an Indianapolis municipal tree-growing station, but the city refused to release the property for a new high school.[102]

The effort to construct a new Attucks collapsed when the final possible site became unavailable. Construction of a new high school at this site required a zoning change by the Marion County Metropolitan Development Commission. The commission rejected the zoning change after CIQS supporters appeared en masse at a hearing lobbying the commission to deny the IPS petition for a zoning change.[103] The IPS Board did not ask Judge Dillin to intercede in this zoning dispute. Judge Dillin subsequently questioned whether the Metropolitan Development Commission had the power to deny the zoning change where the effect of the denial was to interfere with the desegregation of the schools, and he suggested that IPS should have made the zoning dispute a part of the desegregation case.[104] Although the Metropolitan Development Commission was subsequently made a party to the case in federal court, the IPS Board did not ask the court to review the zoning change denial.[105]

The proposal to close Shortridge High School received similar opposition from a different segment of the community. Shortridge High School, the oldest high school in Indianapolis, is located in the north central part of the city, an area now predominantly black, but which historically was the home of the Indianapolis white establishment. Shortridge enjoys in Indiana an excellent reputation as an academic high school. Indiana citizens are proud of the fact Shortridge is the alma mater of many nationally prominent people, such as Kurt Vonnegut.[106] The opposition to

---

[100] *Id.*

[101] The school board election was held in May 1968. Because of staggered terms, four persons elected in 1968 took office July 1, 1968, and the three remaining members elected in 1968, began their four-year terms on July 1, 1970. Sammy Dotlich was appointed to fill the unexpired term of Richard G. Lugar effective July 11, 1967. Dotlich was elected in May 1968, and his four-year term commenced July 1, 1968.

[102] 332 F. Supp. at 674.

[103] Confidential personal interview.

[104] 332 F. Supp. at 679-80. The Metropolitan Development Commission was subsequently made a party to the case. The issue which brought the commission into the case was whether past zoning practices would provide the basis for an interdistrict remedy.

[105] *Id.*

[106] Some of the same people are disgruntled by the fact Shortridge is the

the closing of Shortridge came from some of the most prominent and most powerful people in Indianapolis, including Mayor Richard G. Lugar.[107] Lugar, a graduate of Shortridge, was a member of the IPS Board from 1964 to 1967, when he was elected Mayor. During his tenure on the school board, he originated and attempted to effectuate the Shortridge Plan, a program designed to maintain an acceptable racial balance at Shortridge despite its loaction in an all-black neighborhood. The plan contemplated making Shortridge a magnet school[108] with an outstanding academic college preparation curriculum. The plan was unsuccessful partly because it existed more on paper than in the classroom. It was abandoned in 1968.[109]

As a consequence of the black opposition to the closing of Crispus Attucks, the white power structure opposition to the closing of Shortridge, and the CIQS opposition to a new Crispus Attucks, the school board gave up its efforts to voluntarily desegregate the schools. When the Metropolitan Development Commission denied the zoning change request for the new Crispus Attucks High School location, the board accepted the inevitability of a trial.[110] The efforts to devise a solution were replaced by a consensus among the board members that no plan to desegregate the schools could be implemented by the politically sensitive board without an order from the federal court.[111] There was some sentiment on the board that the board should not attempt to voluntarily desegregate the schools without a court order because the board had no method, other than a judicial decree, of assuring that a subsequent board would not reverse its efforts.[112]

---

apparent model of Shortley High School in Dan Wakefield's novel *Going All the Way*. Wakefield is a Shortridge graduate.

[107]Confidential personal interview.

[108]Under the plan, Shortridge was not a complete magnet school. It was rather a combination of students from the neighborhood and students attracted from other neighborhoods. The reluctance of IPS to "go all the way" may have been fatal to the plan.

[109]Confidential personal interview.

[110]*Id.*

[111]The IPS board was politically sensitive because community groups had been successful in blocking contemplated board actions. In retrospect it seems surprising that the board was not more independent. Unlike some cities such as Boston, the school board in Indianapolis is not commonly used as a springboard to higher political office. Of the 13 different persons who served on the board between July 1967 and 1971, only one, Robert DeFrantz, has been a candidate for public office. DeFrantz was a candidate for reelection to the IPS Board in 1972 and is again a candidate in 1976. Richard G. Lugar, who left the IPS Board in 1967 to run for Mayor of Indianapolis and who in 1976 is a candidate for election to the United States Senate, is the only notable exception to the rule.

[112]Confidential personal interview.

Judge Dillin was patient while the school board attempted to desegregate the high schools. Following a December 1969 order that the case be expedited to trial, the IPS Board, on January 27, 1970, adopted the resolution which proposed desegregating the high schools by closing Shortridge and Attucks. In response to this resolution, Judge Dillin vacated the pretrial order expediting the trial, stating that developments had occurred which might lead to settlement of the case.[113] It was only after the board's efforts to desegregate the high schools had failed and the board gave up the attempt at voluntary desegregation that Judge Dillin proceeded with the trial.

Too many strong, inflexible segments in the community blocked the board's efforts. Some of those same forces, principally CIQS and similar groups, led the subsequent attacks on Judge Dillin. One of the most common grievances has been that Judge Dillin was too anxious to assume control over desegregation of the public schools. This criticism ignores the fact that he did not play an active role in the controversy until after the IPS Board concluded that it could not resolve the problem without outside intervention. Judge Dillin's granting of a continuance in January of 1970 demonstrates he was willing to let the school board develop its own solution and that he gave the board all the time it asked in order to develop a voluntary plan.

The board members' failure to voluntarily desegregate the high schools discouraged them from attempting to desegregate the elementary schools. They felt it was apparent that if they could not desegregate the high schools because of public pressure, they could not possibly desegregate the elementary schools.[114] The board never reached any concrete proposals, since the approach was to consider the elementary schools only after successfully dealing with the high school problem, which was never successfully resolved. It is unclear what were the actual sentiments of the board members in 1971 as to what should be done about the segregated elementary schools. The board might have tested the legality of racial composition in the elementary schools by defending the case even if it had been successful in desegregating the high schools. There had always been more opposition on the board with respect to busing elementary students than with the high schools.

---

[113] *Id.*

[114] *Id.*

III. The Violation Trial—1971

A. The Government's Case

The issues raised by the Government's complaint as to the constitutionality of the racial balance of IPS students went to trial before Judge Dillin on July 12, 1971, more than three years after the complaint was filed. The early IPS strategy of separating the trial into three segments did not prevail at the trial. The teacher assignment issue had been resolved. The issues involving student assignments in the elementary schools and high schools were tried together.

The Government proved beyond doubt that prior to 1949 the Indianapolis Public Schools were segregated. The IPS system prior to 1949 was described as a typical southern, urban segregated school system;[115] the evidence demonstrating segregation by law prior to 1949 was not challenged or controverted by counsel for the defendants.

In 1949, when the Indiana General Assembly enacted legislation outlawing dual school systems, the official IPS policy was changed to conform with the state law.[116] In the critical post-1949 phase of the case, the Government offered evidence to prove that even following the change in official policy IPS did nothing, despite the requirements of the new state law, to eliminate the then existing dual system, but actually engaged in a pattern of actions designed to promote segregation and maintain a dual school system.[117]

The bulk of the Government's evidence was testimony and exhibits designed to demonstrate seemingly minor, individual actions of the IPS Board and administration which tended to promote segregation. The Government's strategy was to accumulate these actions to show a pattern of unlawful discrimination.[118]

This evidence of de jure segregation after 1949 included several categories of school board activity: construction of new schools and additions to existing schools, boundary changes for elementary school districts, high school feeder school patterns, optional attendance zones, alteration in grade structures, transportation policies and practices, and special education classes.[119]

---

[115] *Id.*

[116] Thornbrough, *Segregation in Indiana During the Klan Era of the 1920's*, 47 Miss. Valley Hist. Rev. 594, 605-06 (1961).

[117] 332 F. Supp. at 665-70.

[118] Closing argument, John D. Leshy, July 21, 1971. Record, vol. VIII, at 1342-69.

[119] At the end of the trial Judge Dillin found that IPS actions in each of these categories had in fact promoted segregation in IPS. 332 F. Supp. 655.

The Government did not make a serious attempt to show purposeful racial discrimination, other than by inference, with respect to any of these actions. The evidence was instead designed to show that the cumulative effect of the school board actions was generally to promote segregation. In some instances, particularly boundary changes, government counsel suggested an inference of racial discrimination from the absence of any rational motivation for the decision other than racial separation.[120] In the post-1949 phase, there was no "smoking gun" in the Government's evidence but instead a large body of evidence, the cumulative effect of which, the Government suggested, showed a consistent pattern of racial segregation.[121]

The United States attempted to prove de jure segregation in the location of new schools. A stipulation entered in the record on August 5, 1968,[122] in connection with the settlement of the teacher issue, shows that from 1961 to 1968, 16 new IPS schools were constructed. Only one of these schools was significantly integrated on the day it opened. Fourteen of the 16 new schools opened with at least 99 percent white student population, one school opened with 820 black students and 20 white students, and another school opened with 997 white students and 318 black students.[123] The inferences drawn from these statistics were embellished by evidence that some of the new schools were built adjacent to schools attended primarily by students of the opposite race, thus inhibiting integration of the neighboring school districts.[124] The construction of two new high schools perpetuated segregation because the schools were located at the extreme northeastern and northwestern areas of the city where "the Board knew they would serve virtually all-white areas."[125]

At the time of the trial, the board was planning to build Forest Manor Middle School for grades six through eight. The school would open at the proposed location[126] with a student body approximately 90 percent black.[127] Judge Dillin cited this proposed school as evidence that IPS' actions perpetuating segregation were continuing up to the day the opinion was published, August

---

[120] 332 F. Supp. at 663-72.

[121] *Id.*

[122] Stipulation No. XI (filed Aug. 5, 1968).

[123] *Id.*

[124] *See, e.g.*, Record, vol. IV, at 873-82.

[125] 332 F. Supp. at 669, n.65.

[126] 4501 E. 32nd St.

[127] 332 F. Supp. at 671.

18, 1971.[128] He ordered the school board to cease and desist from further planning of the school at the proposed location.[129]

Evidence was introduced at trial showing that the construction of new additions to existing schools had "more often than not . . . been used to promote segregation."[130] The court found that IPS had

> built additions at Negro schools and then zoned Negro students into them from predominantly white schools; it has built additions at white schools for white children attending Negro schools; it has generally failed to reduce overcrowding at schools of one race by assigning students to use newly built capacity at schools of the opposite race. The Board has also constructed simultaneous additions at contiguous predominantly white and Negro schools, and has installed portable classrooms at schools of one race with no adjustment of boundaries between it and neighboring schools of the opposite race.[131]

The evidence also showed that additions had been constructed to large black elementary schools where the board could have increased integration by adding classrooms to smaller, nearby white schools. The plaintiff offered evidence of these acts of de jure segregation from IPS records of construction projects and enrollment figures.[132]

The Government sought to prove that the use of optional attendance zones was part of a pattern of promoting segregation. Optional attendance zones for both elementary and high school assignments were utilized in various neighborhoods where the residential housing patterns were integrated. The optional attendance zone permitted students in the zone, a portion of a district, to attend one of two or more schools. Generally one school was white and one black. There was evidence that the students in the optional attendance zones customarily attended the school in which most of the students were of their race, even where this involved crossing actual barriers such as railroad tracks, arterial streets or rivers.[133]

---

[128] *Id.*

[129] 332 F. Supp. at 681. Forest Manor School was ultimately built at 4501 E. 32nd Street, but the school opened with a more acceptable racial balance. The racial balance was adjusted by a court-approved alteration of the elementary school feeder patterns. The changes require busing some students.

[130] 332 F. Supp. at 667.

[131] *Id.*

[132] Gov't Exhibits 48 & 171.

[133] Record, vol. II, at 208-14, 244-46 (July 13, 1971); vol. IV, at 821-25 (July 15, 1971).

The Government presented evidence designed to show that IPS boundary changes had promoted segregation. IPS administrators testified that there had been approximately 350 changes in the boundaries of elementary school districts since the districts were established in 1953.[134] These changes were said to be necessitated by the rapidly expanding school population and were utilized to alleviate overcrowding in some schools. Although there was no direct evidence that any boundary changes were motivated by a desire to perpetuate segregation, Government counsel argued that an inference of racial motivation was established because there was no other rational explanation for some of the changes. The Government displayed numerous examples of unusually shaped districts, districts which ignored natural barriers, and districts drawn precisely between the black and white communities. Many of the changes followed an adjustment of the racial composition of a neighborhood. Judge Dillin found that "[a]ccording to the evidence, there have been approximately 350 boundary changes in the system since 1954. More than 90 percent of these promoted desegregation."[135]

The racial composition of IPS high schools was scrutinized. The high school attended is determined by a feeder school system—all the students from an elementary school are assigned to a particular high school. Evidence was introduced to show IPS perpetuated segregation of the high schools by changing the feeder school assignments. As the racial composition of neighborhoods changed, the racial composition of elementary schools changed, sometimes with assistance from alteration of boundary lines.[136]

One method of alleviating overcrowding in some schools was to bus some of the students to another school. There was evidence to show that generally students were transferred to a school where most of the students were of their race, sometimes to the exclusion of closer schools with space available.[137] The Government suggested this practice had the effect of promoting segregation in the schools.[138]

---

[134]Gov't Exhibit 27.

[135]332 F. Supp. at 670.

[136]Gov't Exhibit 88.

[137]Record, vol. IV, at 839 (July 15, 1971).

[138]The following persons were called to testify by the United States:

a. Virgil Stinebaugh, IPS Superintendent of Schools from 1944-1950; thereafter an IPS school principal until 1963. Record, vol. I, at 29-30.

b. Alexander Moore, IPS Assistant Superintendent in charge of curriculum supervision. *Id.* at 43.

c. Paul I. Miller, IPS Assistant Superintendent for elementary education. *Id.*, vol. II, at 270.

B. The IPS Defense

In its defense, IPS asserted that the districts for elementary schools were based on a neighborhood school concept and that the schools were de facto segregated because of housing patterns in the community rather than because of acts of segregation by the school board or the administration.[139] This de facto defense was coupled with the IPS position that any racial segregation which may have existed in the public schools of Indianapolis was in the past. IPS contended that practices of segregation had ceased prior to the trial and it no longer acted in any manner which could promote segregation. This defense was based on a proposition that the legal issue should be whether IPS was *presently* acting to promote segregation of the schools. The defendants conceded that the system had at one time been a dual school system but asserted that IPS had attempted to eliminate the dual system and was no longer acting in a manner which would promote a dual system.[140]

The IPS Superintendent of Schools and an assistant superintendent testified[141] that the board decisions, which the Government

d. George F. Ostheimer, IPS Superintendent of Schools from 1959 until March 1, 1969, when he retired. *Id.*, vol. IV, at 849.

e. Stanley C. Campbell, IPS Superintendent of Schools from 1969 to 1972. *Id.*, vol. V, at 946.

f. John Patterson, principal of IPS school 4 and a teacher in the IPS system since 1950. *Id.*, vol. IV, at 835-36.

g. Roscoe R. Polin, assistant principal IPS School 101; student at IPS Manual High School and Crispus Attucks High School from 1924-1928; and an IPS teacher since 1943. *Id.*, vol. IV, at 842-43.

h. Wilbur W. Barton, IPS industrial arts teacher from 1938-1968. *Id.*, vol. IV, at 820.

i. Arthur Boone. *Id.*, vol. IV, at 790-96.

j. Patrick E. Chavis, Jr., Boone's attorney. *Id.*, vol. V, at 966.

k. Grant W. Hawkins, first black member of the Indianapolis School Board. *Id.*, vol. IV, at 863.

l. William T. Ray, black realtor in Indianapolis for 25 years, and the first black member of the Indianapolis Real Estate Association in 1962. *Id.*, vol. V, at 911.

m. Theron A. Johnson, Director of the HEW team which drew up a proposed plan. *Id.*, vol. V, at 970.

[139] *See* note 51 *supra*.

[140] Closing Argument, G.R. Redding, July 21, 1971. Record, vol. VIII, at 1380-81.

[141] Defendants' witnesses were:

a. Stanley C. Campbell. *Id.*, vol. VI, at 1037.

b. Karl Kalp, IPS Associate Superintendent. *Id.*, vol. VI, at 1172.

c. William G. Mahan, IPS Assistant Superintendent for Personal Administration. *Id.*, vol. VII, at 1222.

d. Harry A. Radliffe, IPS Assistant Superintendent, Special Services. *Id.*, vol. VII, at 1251.

argued were evidence of segregation, were necessitated by a rapid growth in school population. All decisions, they said, were based on the neighborhood school concept, *i.e.* students should attend school in the neighborhood in which they reside without regard to its racial makeup.[142] As to decisions regarding the construction of new schools, identified by the government as de jure acts of segregation, the defendants argued that all the decisions were based on the neighborhood concept.[143] With respect to the Forest Manor Middle School, which the court found to be a continuing act of segregation right up to the time of its decision on August 18, 1971, the defense had claimed the school was needed in the black neighborhood in which it was proposed and that a failure to build a school in this neighborhood because of the race of the students would be an act of discrimination against the residents of the neighborhood.[144] The defense asserted that the proposed location was chosen on a racially neutral basis—the need for a school—and it was legally irrelevant that the school would be nearly all black when it opened.[145]

C. The Decision

1. General Conclusions

The trial concluded on July 21, 1971, and Judge Dillin announced his decision in a lengthy opinion on August 18, 1971.[146] Judge Dillin found that IPS was operating an unlawfully segregated school system on May 17, 1954 (the date of *Brown* I),[147] that IPS was continuing to operate an unlawfully segregated school system on May 31, 1968[148] (the date the complaint was filed against IPS), and that this unlawful segregation had not been

e. Joseph C. Payne, IPS Assistant to the Superintendent in charge of planning. *Id.*, vol. VII, at 1295.

f. Janet Hess, Research Statistician of the Community Service Counsel of Indianapolis. *Id.*, vol. VII, at 1267.

g. J. Hartt Walsh, Dean of the College of Education of Butler University and member of a committee of six who studied school boundaries in 1968. *Id.*, vol. VII, at 1278-79.

[142]Direct exam, Stanley Campbell, July 19, 1971. *Id.*, vol. VI, at 1037-1111; cross exam, Joseph Payne, July 20, 1971. *Id.*, vol. VII, at 1302-25.

[143]*See, e.g.*, *Id.*, vol. II, at 371 (July 13, 1971); *id.*, vol. VII, at 1397 (July 21, 1971) (closing argument of G.R. Redding).

[144]Closing argument, Stephen Terry, July 21, 1971. Record, vol. VIII, at 1392-93.

[145]*Id.*

[146]332 F. Supp. 655.

[147]*Id.* at 677-78.

[148]*Id.*

eliminated as of the trial of the case.[149] Judge Dillin rejected the IPS theory that past practices were irrelevant and also rejected the factual justifications for the segregation presented by IPS.[150]

Having found the IPS system unlawfully segregated, Judge Dillin set the stage for the controversial remedy stage of the litigation with three of his conclusions of law:

> [T]he [IPS] Board is "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination (will) be eliminated root and branch."[151]
>
> All provisions of federal, state or local law requiring or permitting racial discrimination in public education must yield to the principle that such discrimination is unconstitutional; revisions of local laws and regulations and revision of school districts may be necessary to solve the problem.[152]
>
> This Court has continuing jurisdiction to make and enforce such decrees in equity as are necessary to accomplish the above mentioned objective. Once a right and violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.[153]

These terse conclusions of law signal Judge Dillin's approach to the challenge of desegregating IPS. Judge Dillin had, in the early stages of the case, demonstrated an open animosity toward the efforts of the Justice Department and the Department of Health, Education, and Welfare to intervene in local school affairs.[154] From his opinion in the case, it appears the judge was persuaded beyond a doubt during the trial that the IPS system was unlawfully segregated and the court had a duty to eliminate the segregation.

---

[149] *Id.*

[150] *See, e.g., id.* at 658.

[151] *Id.* at 678 (for this conclusion the opinion cites Brown v. Board of Educ., 349 U.S. 294 (1955) [hereinafter cited as Brown II]; and Green v. County School Bd., 391 U.S. 430 (1968)).

[152] *Id.*, citing Brown II.

[153] *Id.*, citing Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

[154] Confidential personal interview.

2. Preparations for the Remedy Trial

In charting the course for formulation of a remedy, Judge Dillin was strongly influenced by evidence at the trial regarding what the court called the "tipping factor." Theron A. Johnson, Office of Education of the Department of Health, Education, and Welfare testified that when the percentage of black pupils in a given school reached approximately 40 percent, there was accelerated and irreversible white flight from the neighborhood in which the school was located.[155] Since IPS had, at the time the opinion was written in the fall of 1971, 37.4 percent black students, Judge Dillin concluded that a "massive 'fruit basket' scrambling of students" within IPS would in the long run not be an effective remedy because every school in the system would be near the tipping point.[156] The court's principal concern was that the resulting white flight would be so severe that the entire IPS system would become all black.

During the course of the trial, Judge Dillin repeatedly demanded, but never got, HEW statistics showing the resegregation effects of desegregation remedies in other cities. The judge expressed disbelief that such statistics were not available.[157] He apparently was influenced by the opinion in *Calhoun v. Cook*,[158] which indicated that as a consequence of desegregating Atlanta's schools, the Atlanta system had gone from 70 percent white students in 1961 to 70 percent black students in 1971.[159]

Sketchy as it may have been, the tipping point factor evidence was the most critical in terms of having the greatest impact, of all the evidence in the trial. Judge Dillin has not deviated from his reliance on the tipping point factor, but he has more explicitly recognized that there is no magic figure and that in some cases the 40 percent figure is too high.[160]

Though the phrase "interdistrict remedy" apparently had not been coined in 1971, in retrospect it seems clear Judge Dillin in his August 18, 1971, opinion was exploring possible legal theories on which an interdistrict remedy might be based. At the time the opinion was written, there were no answers nor even any

---

[155]Direct exam, Theron Johnson, July 16, 1971. Record, vol. V, at 995-96; Gov't Exhibit 178 at 14.

[156]332 F. Supp. at 678-79.

[157]*See, e.g.*, questions by the court to Theron A. Johnson, July 16 and 20, 1971. Record, vol. V, at 1019-23; *Id.*, vol. VII, at 1337.

[158]332 F. Supp. 804 (N.D. Ga. 1971).

[159]*Id.* at 805.

[160]*See, e.g.*, United States v. Board of School Comm'rs, 368 F. Supp. 1191, 1197 (S.D. Ind. 1973).

suggestions from the appellate courts with respect to the legality of interdistrict remedies. Judge Dillin was on the cutting edge of a developing area of law with no guidance from higher courts or the parties in the case. The Justice Department had not taken a position regarding the appropriate remedy and had not introduced evidence at the 1971 trial which was designed to bear on the remedy issue.

Judge Dillin directed the future course of the litigation by raising questions about situations in which the law will permit or will require an interdistrict remedy.[161] The questions posed by the judge suggested several theories which would subsequently be litigated. First, does the creation by the Indiana General Assembly in 1969 of the consolidated city-county government for Marion County (Uni-Gov), without similar extension of the territory of IPS, constitute legal grounds for an interdistrict remedy?[162] Second, does the failure of the State of Indiana, including the General Assembly, to provide for a metropolitan school district embracing all of Marion County constitute unlawful segregation by the state?[163] The theory that it does is based on the proposition that the state has an affirmative duty to eliminate the de jure segregation in the IPS. Finally, do the actions of the Metropolitan Development Commission of Marion County contribute to unlawful segregation by placement of low income housing projects?[164]

The only additional basis, not suggested in this opinion, on which an interdistrict remedy has been considered concerns restrictive zoning practices by suburban communities. If shown to contribute to residential segregation, such practices might justify an interdistrict remedy. This is the theory of relief suggested by Mr. Justice Stewart in *Milliken v. Bradley*.[165]

Judge Dillin ordered further proceedings to consider the remedy issue.[166] He also ordered that three groups of new defendants be brought into the case.[167] First, the judge ordered the Justice Department lawyers to "prepare and file appropriate pleadings to secure the joinder herein as parties defendant of the necessary municipal corporations and school corporations which

---

[161]332 F. Supp. at 679. Judge Dillin's critics contend these questions demonstrate the judge was committed, at least as early as 1971, to a metropolitan desegregation plan and was, in subsequent proceedings, searching for a theory upon which to justify such a plan.

[162]332 F. Supp. at 679.

[163]*Id.*

[164]*Id.*

[165]428 U.S. 717 (1974).

[166]332 F. Supp. at 678-79.

[167]*Id.* at 679-80.

would have an interest" in the consideration of an interdistrict remedy.[168] Second, he ordered IPS to "proceed similarly as to those agencies which would appear to have an interest" in the theories based upon allegations of unlawful actions by government subdivisions other than the school corporations.[169] Finally, the judge ordered the Justice Department to serve process on the Indiana Attorney General "[b]ecause of the interest of the State of Indiana in the constitutionality of its law . . . ."[170] Judge Dillin emphasized that the suggested theories were not exhaustive and seemed to solicit additional input and invite others to seek intervention.

3. Intermediate Remedial Orders

While establishing the process by which the final remedy would be ascertained, Judge Dillin ordered IPS to make several changes designed to stabilize the racial balance in the IPS schools and to prevent further segregation during the formulation of the final remedy. IPS was ordered to immediately assign faculty and staff so that no school could be racially identified by its faculty or staff.[171] This portion of the order was unanticipated since the faculty and staff segment of the case had been resolved by a consent judgment before the trial. Judge Dillin apparently made this order because of the evidence that experienced black faculty members were being reassigned to white schools and were being replaced in the black schools by less experienced white faculty members. IPS was ordered to redress the situation.[172] When school opened less than a month later on September 7, 1971, 132 teachers were reassigned after another bitter dispute between IPS and teachers.[173]

IPS was ordered to "[i]mmediately continue with their plans to desegregate and relocate Crispus Attucks High School."[174] White students attended the historically all-black Crispus Attucks for the first time in the fall of 1971, when 900 white 9th and 10th grade students were assigned there.[175]

No serious effort to relocate Crispus Attucks was made after 1971. The IPS Board had earlier made a diligent though unsuc-

[168] *Id.*

[169] *Id.* at 680.

[170] *Id.*

[171] *Id.*

[172] *Id.*

[173] News, Sept. 7, 1971, at 1, col. 4.

[174] 332 F. Supp. at 680.

[175] Blacks in Indianapolis won't soon forget that as soon as Judge Dillin ordered Crispus Attucks integrated, IPS spent $250,000 to improve the physical structure. Confidential personal interview.

cessful effort to relocate Attucks, but its efforts were thwarted by public opposition and it had no desire to undertake the battle again. On January 11, 1972, the IPS Board resolved to abandon its plans to construct a new building to replace Attucks, and Judge Dillin approved this action. IPS attributed its decision to projections showing a declining enrollment.[176]

Judge Dillin ordered IPS to alter its "majority-to-minority transfer" policy to encourage voluntary integration.[177] This voluntariness was to be promoted by providing transportation to students making such transfers, eliminating a requirement that such transfers would be dependent upon availability of space, and publicizing the transfer option to eligible students and their parents.[178] These changes were made by IPS, but the transfer policy had no noticeable impact on the racial composition of the schools.

The court ordered IPS to attempt to negotiate with suburban school corporations for possible transfer of minority race students to the suburban school for the upcoming school year.[179] IPS promptly initiated contact with the other Marion County public school corporations and the two non-Marion County schools mentioned in the opinion, Carmel-Clay and Greenwood. After preliminary discussions IPS formally proposed that each school corporation accept from Indianapolis black students equal to from 2 to 5 percent of their total enrollment.[180] Judge Dillin never ruled upon the acceptability of this token transfer, but it is believed that he would have approved if all suburban schools had agreed to accept 5 percent minority students. In a statement to the news media on September 8, 1971, Judge Dillin implored the suburban schools to voluntarily accept the black students saying the suburban school corporations would be "brought to trial" unless a voluntary plan were reached.[181] Judge Dillin did not say how many students would have to be transferred to make the plan agreeable to him, but the *Indianapolis Star* reported, "it is believed" an agreement to accept close to 5 percent black students would be acceptable to the Judge.[182] At a pretrial conference in December 1971, Judge Dillin commented that he would "probably approve 5 percent."[183]

On September 13, 1971, the school board of the Metropolitan School District of Lawrence Township held a public meeting to consider the IPS proposal. More than 1,000 persons, mostly par-

[176]Star, Jan. 12, 1972, at 25, col. 3.
[177]332 F. Supp. at 680.
[178]*Id.*
[179]*Id.*
[180]News, Aug. 28, 1971, at 3, col. 1.
[181]Star, Sept. 8, 1971, at 1, col. 4.
[182]*Id.*
[183]Star, Dec. 21, 1971, at 1, col. 3.

ents, attended the meeting to show their support of the school board's position against the transfer of children to the township schools.[184] Not surprisingly the Lawrence board voted to reject the IPS proposal. Eventually all of the other surburban school corporations rejected the IPS proposal.[185]

This order was the first indication of the court's inclination toward a remedy which would desegregate the inner-city black schools by one-way transportation of the black students to the white suburban schools with no reciprocal transportation of white students to black schools in the city. This controversial approach is found in each subsequent major decision of Judge Dillin relating to specific plans for desegregation.[186]

Judge Dillin ordered that IPS immediately cease and desist from the planned construction of the Forest Manor Middle School until the court could hear further evidence on the subject.[187] Less than a month after the decision Judge Dillin set aside this portion of the order. The Forest Manor Middle School was constructed at the original planned site in an all-black neighborhood, but when it opened students were assigned to it from a much broader area.

4. Tipping Point Schools

Judge Dillin ordered IPS to resurvey the racial composition of all schools for the upcoming 1971-72 school year and "take appropriate action to prevent schools, including high schools, now having a reasonable white-black ratio from reaching the tipping point."[188] This ruling contained the first court-ordered forced busing in Indianapolis. It required the transportation of students as necessary to prevent any school from reaching the tipping point. Judge Dillin also gave notice of his position regarding the busing controversy. In a footnote, he said, "This Court regards the outcry made in some quarters against 'bussing' as ridiculous, in this

---

[184]News, Sept. 14, 1971, at 12, col. 1.

[185]During the course of the subsequent litigation, some attorneys for suburban schools persuaded their clients to voluntarily accept black students from IPS. Those attorneys told this writer Judge Dillin would not approve such settlements unless all suburban schools were included. The hard line resistance in some suburban areas made this a virtual impossibility.

One highly respected attorney told this writer he was nearly fired for pushing his school board to voluntarily settle the case.

[186]The opponents of one-way busing have had little impact in the case. Perhaps there is no way they could have had more impact, but the chances of their having a greater impact may have been increased if Judge Dillin's commitment to one-way busing had been more clearly recognized at this early date.

[187]332 F. Supp. at 681.

[188]*Id.*

age of the automobile. Most students in the outside school corporations have been bussed for years, with never a complaint about bussing per se."[189]

In response to this last order, IPS identified several elementary schools as being near the tipping point of 40 percent black and likely to go beyond the tipping point if not adjusted. Less than 1,000 elementary students were reassigned for the 1971-72 school year. Some of these students were bused to a new school beginning in September of 1971.[190]

These tipping point schools were subsequently included in the interim plan. Now, however, all of these schools are well beyond the 40 percent black student tipping point.[191] It is clear from these statistics that IPS, while it may have complied with the letter, certainly did not comply with the spirit of the order. Judge Dillin plainly intended that the schools be kept below the tipping point not just for one school year but until the formulation of the final remedy. In analyzing the court's failure to enforce the order, it is important to recognize that these four schools were only a minor portion of a complex case. It probably should not be anticipated that the court will strictly enforce such orders unless there are parties to the action or citizens in the affected schools who are willing to scrutinize compliance with the court's orders and pursue violations. This was apparently not done in the present case and may be an example of a need for a court-appointed committee to monitor compliance with the orders.

The tipping point order resulted in the reassignment of less than 1 percent of the IPS students.[192] This is not a very significant change statistically, but this writer believes the order was an important one. One of the conclusions of this Article is that passage of time has resulted in increasing acceptance of court-ordered integration. Without the tipping point order in 1971, no students would have been reassigned or bused until 1973, and the realities of school desegregation would not have become apparent to the people of Indianapolis for two more years. Although

---

[189] *Id.* n.100.

[190] In an interview with this writer an IPS administrator said 144 white students and 251 black students were bused to a new school in 1971 pursuant to this order.

[191] Four of the tipping point schools were schools 11, 53, 70 and 83. In December, 1974, School 11 was 64 percent black, School 70 was 49.5 percent black and School 83 was 87.5 percent black. Enrollments, 1973-1974 and 1974-1975 source and comparison, high schools (9-12), elementary schools (K-8) Indianapolis Public Schools, December, 1974. Filed in Federal Court, Cause No. IP 68-C-225 by attorneys for IPS on December 23, 1974.

[192] *See* note 190 *supra*.

it was only a token, the token was important because it meant school desegregation in Indianapolis actually began in 1971.

D. Community Response to the Decision

Political leaders in Indianapolis responded promptly to the decision. With the notable exception of Stanley Campbell, the IPS Superintendent of Schools, all responded adversely.

The court's opinion was announced approximately ten weeks before the Indianapolis mayoral election. Since the opinion raised doubts about the legality of Uni-Gov and its effect on the school system, the school desegregation case immediately became a campaign issue.[193] The fact that Richard G. Lugar, Mayor and Republican candidate for reelection, had been a member of the IPS Board from 1964 to 1967 added fuel to the political controversy. Both candidates for mayor responded quickly and negatively to the decision. Though both candidates stated several times the school desegregation case was a bonus issue in the mayoral campaign, because the mayor had no legal power regarding the schools, both candidates continued to emphasize their own opposition to forced integration of schools.

Democratic candidate John F. Neff was widely accused of running a racist campaign. The allegations were based in large part on his vocal opposition to Judge Dillin's opinion. William M. Schreiber, Marion County Democratic Chairman and candidate for the 1975 Democratic nomination for mayor said,

> [t]he 1971 mayoralty election saw the Democratic candidate [Neff] make a desperate anti-busing appeal to the suburban 'doughnut' that surrounded the 'old city.' That appeal was an effect of consolidation [Uni-Gov] : it would never have been made otherwise.[194]

---

[193]Democrats in Marion County have always been opposed to Uni-Gov. A large portion of the voters brought into the city are Republicans. The Democrats' opposition to Uni-Gov did not end with the consolidation of the city and county governments by the Indiana General Assembly. Marion County Democrats are still trying to dismantle Uni-Gov. In evaluating the public response, one should note that the Indianapolis newspapers, the *Star* and the *News*, have consistently been sharp critics of Judge Dillin's actions in the case. Some people in Indianapolis believe the newspapers have contributed to the adverse public reaction. Judge Dillin's supporters believe the Indianapolis newspapers have unfairly reported the case and have withheld coverage of the school desegration case in Louisville, Ky., a case with many similarities to the Indianapolis case. In contrast, the *Louisville Courier-Journal* has comprehensively reported the Indianapolis case.

During a proceeding in open court on August 20, 1973, Judge Dillin described an editorial in the *Indianapolis News* as asinine. Record at 237.

[194]W. Schreiber, Indianapolis-Marion County Consolidation, How Did It All Happen? 33 (Indiana University Masters Thesis).

Shortly after the opinion was handed down Mayor Lugar announced his opposition to a metropolitan desegregation plan. Lugar spoke against "forced busing" to obtain racial balance and also stated that he was opposed to the concept of a metropolitan school district, one school district encompassing all of Marion County. His opposition was based on the size of the resulting district.[195] Lugar was quoted in 1971 as saying that he felt IPS was too large. He opposed a new Crispus Attucks on the ground that it was not needed, and opposed integration of the existing Attucks on the grounds that it was "several years late." Lugar cited a "new spirit" in the black community as evidenced by the building of a new community-owned supermarket, Our Market, which was built on the site of a neighborhood market which had been burned during racial violence in 1969.[196] Apparently the Mayor meant by this that in his judgment the black community wished to keep Crispus Attucks as an all-black high school, or at least as a high school which was not artificially integrated.[197] Regarding the Uni-Gov issue and the court's suggestion that Uni-Gov might be the source of an interdistrict remedy, the Mayor said that "Uni-Gov is a red herring dragged across the path."[198]

The Mayor's Democratic opponent, John F. Neff, tried very hard to sound as if he were more opposed to Judge Dillin's decision than the Mayor. He attempted to connect the Mayor directly with the decision. Neff indirectly charged Lugar with responsibility for the decision. Because Lugar was Mayor and a former member of the IPS Board, he was partially responsible for the segregated schools and the segregated schools were the reason for the decision. Neff, a lawyer, was not content to simply use the decision as a campaign issue. On August 23, 1971, five days after Judge Dillin's decision, Neff, along with two of his associates, filed a petition to intervene as parties to the IPS desegregation case. Neff's stated reasons for seeking intervention were to "challenge the constitutionally of Uni-Gov" and to "have the court order a referendum on Uni-Gov" for the November ballot.[199]

---

[195]Star, Aug. 20, 1971, at 1, col. 5. Bill Schreiber reports that in 1966 Lugar, as a member of the Indianapolis Progress Committee "proposed that the eleven school districts of Indianapolis and Marion County be consolidated." Schreiber says that "[p]ublic reaction was so overwhelmingly negative and hostile that Lugar withdrew his proposal, having learned at minimal expense the depth of sentiment in metropolitan Indianapolis for the status quo." Schreiber, *supra* note 194, at 2.

[196]Star, Aug. 20, 1971, at 1, col. 5.

[197]Four years later, as part of the interim desegregation plan, two of the mayor's sons attended Crispus Attucks High School.

[198]Star, Aug. 20, 1971, at 1, col. 5.

[199]Confidential personal interview.

Neff's prayer for a ruling on the constitutionality of Uni-Gov came despite the fact that the Indiana Supreme Court had held Uni-Gov to be constitutional.[200]

Judge Dillin promptly and firmly responded to Neff's attempt to involve the court in the mayoral campaign. He denied Neff's petition on September 1, 1971, commenting that the petition raised "sham issues put forward in the interest of political opportunism."[201] Judge Dillin's sharp rebuff of candidate Neff may have been prompted by charges that his decision was politically motivated. The day after the decision was announced, L. Keith Bulen, Marion County Republic Chairman and a lawyer, was quoted by the *Indianapolis Star* as saying that

> "the former Democratic State Senate leader, now Federal judge, has a fine political as well as legal mind. . . .
>
> We will study immediately and carefully his dictum and findings in order to evaluate more fully his talents in both arenas, as we coincidentally approach the last two months before our city elections."[202]

The only public support for the decision came from the Indianapolis Chapter of the NAACP and the Indianapolis Urban League. The Rev. John P. Craine, Bishop of the Episcopal Diocese of Indianapolis and president of the Indianapolis Urban League, hailed the decision as a " 'landmark for all cities, since it talks of the inclusiveness of a metropolitan area in all our planning and working.' "[203] The most vocal supporter of Judge Dillin's decision was Stanley Campbell, the IPS Superintendent of Schools. The day after the decision was announced Campbell was quoted as saying "I have a great deal of confidence in his [Dillin's] thinking . . . ."[204] Campbell added that he had doubts whether a metropolitan school system would solve segregation problems in Indianapolis or elsewhere but said that the school officials could live with the decision.[205] On September 1, 1971, Campbell told an Indianapolis Rotary Club meeting the following:

> I have some criticisms, but I was tremendously impressed with the way he got to the heart of the problem

---

[200]Dortch v. Lugar, 255 Ind. 545, 266 N.E.2d 25 (1971).

[201]Star, Sept. 1, 1971, at 1, col. 3.

[202]Star, Aug. 20, 1971, at 1, col. 5. Other adverse reactions included a comment from Theodore L. Sendak, Indiana Attorney General, who called the decision to bus school children to achieve racial balance a " 'kind of Hitlerism on wheels.' " Star, Sept. 2, 1971, at 38, col. 1.

[203]Star, Aug. 20, 1971, at 1, col. 5.

[204]Star, Aug. 19, 1971, at 11, col. 5.

[205]*Id.*

> and particularly its long range implications. I personally have thought this is a great challenge for the community. The community, Dillin's ruling indicates, has a guilty conscience and the school system has been the focus of segregated practices. . . .
>
> As superintendent I feel the decision was reasonable and has pointed us toward improved educational practices.[206]

Statements like this caused Campbell to be a major issue in the 1972 school board election and resulted in his immediate firing when his detractors were elected.

At an IPS Board meeting on August 31, 1971, the board voted four to three to appeal Judge Dillin's August 18, 1971, decision to the United States Court of Appeals for the Seventh Circuit. In light of the long list of essentially uncontroverted acts of unlawful segregation recited in the opinion and the fact that the opinion was not a final judgment,[207] the vote to appeal came as a surprise to many. The decision to appeal was not, however, a demonstration of the board's continuing, inflexible belief in the legal positions they took at trial. The three black members of the board voted against an appeal.[208]

Some board members believed that any procedure which might possibly obtain a reversal of the court's order should be attempted and for this reason favored an appeal. There was some sentiment on the board that the community was entitled to an appellate review of this important decision as a matter of course without regard to the feelings of individual board members regarding the merits of the case. The decisive votes were cast by two Indianapolis lawyers. These two board members were quoted as saying that the appeal was "more 'to keep the options of the board open' in the event of further rulings by Dillin than to block what has already been decreed."[209]

Also discussed at this meeting was the public criticism, fueled by a newspaper editorial, that the board's position had not been vigorously enough asserted by counsel for the defndants. The two lawyer board members strongly defended the conduct of the litigation by defense counsel[210] and their vote to appeal, which was

---

[206]Star, Sept. 1, 1971, at 10, col. 3.

[207]There was not a final judgment because a remedy had not been ordered.

[208]News, Sept. 1, 1971, at 1, col. 7. The three members voting no were Landrum E. Shields, Jessie Jacobs and Robert DeFrantz. The first two objected on procedural grounds.

[209]News, Sept. 1, 1971, at 1, col. 7.

[210]*Id.*

taken at the same meeting, has been interpreted by some to be in part based on a desire to alleviate this criticism.

The appeal in fact turned out to be extremely important in that the affirmation of Judge Dillin's decision by the Seventh Circuit on February 1, 1973,[211] and the denial of certiorari by the United States Supreme Court,[212] served to alleviate some of the personal criticism of Judge Dillin. The affirmation of the decision on appeal did not silence all critics, but it had a significant impact on the public opinion of more moderate elements of the community. The attention of some hard core critics was diverted from Judge Dillin as an individual to the federal judiciary or to the federal government as a whole. In retrospect, it is clear that the appeal was a definite asset to the court in that it provided Judge Dillin a great deal of credibility that he did not previously enjoy.

Immediately after voting to appeal the court's decision, the IPS Board defeated a motion to request a stay of the court's orders. This action followed advice from the attorneys for the board that a motion for a stay would be a "waste of time because they are so rarely granted."[213]

IV. The Search for a Remedy

On September 7, 1971, the United States, acting pursuant to Judge Dillin's order of August 18, 1971, filed a motion to add parties defendant to the case.[214] Judge Dillin granted the motion the same day. The judge had not ordered the joinder of specific party defendants, thus leaving some discretion to the Government as to which schools in the metropolitan Indianapolis area should be joined. The school corporations added by this motion can be placed in two categories. Eight of the added defendants are the school corporations of the eight townships in Marion County not entirely served by IPS.[215] Two of the new defendants are school corporations which are associated with towns in Marion County.[216]

---

[211] United States v. Board of School Comm'rs., 474 F.2d 81 (7th Cir. 1973).

[212] 413 U.S. 920 (1973).

[213] Confidential personal interview.

[214] 368 F. Supp. at 1195.

[215] *Id.* at 1195-96. These school corporations serve the suburban Marion County portion of metropolitan Indianapolis. The school corporations in this group are the Metropolitan School Districts of Pike, Washington, Lawrence, Warren, Perry, Decatur, and Wayne Townships, and Franklin Township Community School Corporation.

[216] *Id.* at 1196. The two municipal school districts are the Beech Grove City School and the School Town of Speedway. These towns are both in suburban Marion County.

One week later, on September 14, 1968, nine more school corporations from outside Marion County were joined as defendants by the complaint of the intervening plaintiffs, Donny and Alycia Buckley.[217] Two years later, upon the motion of the intervening plaintiffs Buckley, the court added another group of defendants, all school corporations outside Marion County.[218]

The method the Justice Department chose to bring in the additional parties is significant. The United States did not file a complaint or any other pleading against the added defendants.[219] The United States did not charge these schools with acts of de jure segregation and did not ask for any relief against them. The Government's ambivalence in this action set the tone for its posture during the remedy portion of the litigation. During the preparation and trial of *Indianapolis I*, the Justice Department firmly pursued the objectives established in the complaint and presented the case as a dedicated advocate. Once the court found IPS to be unlawfully segregated, the Government seemed to lose its purpose or its conviction; and for the next four years at least, the Justice Department performed a much different role.

The difference may be that when the complaint was filed in 1968, the Government was committed to acquiring a judicial resolution of whether IPS was unlawfully segregated. Once the decision was reached, that commitment was satisfied. The Government has not to date taken a firm position on what the remedy should be. This lack of decisiveness was a burden in the case at times but it is understandable. From 1971 to 1975 was a period of development of remedies for desegregating schools. The appropriate role of the Justice Department may be different in developing the law than in enforcing the law.

---

[217] *Id.* The schools in this group of added defendants are the Mt. Vernon Community School Corp. and the Greenfield Community School Corp. from Hancock County; Mooresville Consolidated School Corp. from Morgan County; Plainfield Community School Corp., Avon Community School Corp., and Brownsburg Community School Corp. from Hendricks County; Eagle-Union Community School Corp. from Boone County; Carmel-Clay Schools from Hamilton County; and Greenwood Community School Corp. from Johnson County. The Buckley children and their mother intervened as representatives of the class consisting of all black school children within IPS. The intervention of the Buckleys was sponsored by the NAACP.

[218] Schools in this group are the Center Grove Community School Corp. and Clarke-Pleasant Community School Corp., Johnson County; Southern Hancock County Community School Corp., Hancock County; Hamilton Southeastern Schools, Hamilton County; and Northwestern Consolidated School District, Shelby County. Request for Service of Process as a Poor Person at Government Expense. Filed 9/12/73 and granted 9/13/73 by Judge Dillin.

[219] 368 F. Supp. at 1195.

The role of the Justice Department in the remedy portion of the Indianapolis school desegregation case is an extremely complex matter, and is clearly oversimplified here; but there are many apparent reasons for the Government's lack of direction. There were seven different philosophies on school desegregation, all of them different from the philosophy of Ramsey Clark, the Attorney General between 1968 and 1975. The remedy issue in desegregation cases has been one of the most emotional issues the country has known and was a highly visible issue in the 1972 presidential election campaign. The Nixon-Agnew administration strongly opposed busing. In addition the attention of the Justice Department was for a portion of this period diverted to Watergate matters, and likely the "Saturday night massacre"[220] did not encourage people in the Justice Department to take firm, unpopular positions.

The added school corporations for the most part responded independently to their joinder. A prominent Indianapolis lawyer represented two of the township schools, Wayne and Lawrence, and his partner represented Warren Township. A law professor with extensive trial experience represented five of the school corporations from outside Marion County. The remainder of the defendants had individual representation, in most cases more than one lawyer. Several of the reasons which prompted the out-of-county schools to coalesce were not present in Marion County. Although the non-Marion County schools added to the case are from distinct towns and each had its own regular school attorney from the respective town, each of these lawyers was a member of a small law office without the resources, and likely without the desired federal court litigation experience, to handle a case of this magnitude. The desire of the outside schools for a litigation specialist and their desire to obtain such services at the lowest possible cost, prompted this group of outside Marion County schools to join together to hire the law professor. The Marion County township schools were each advised on a regular, non-litigation basis by an Indianapolis law firm. When these schools were dragged unwillingly into the IPS case regular counsel stood ready, willing, and indeed very able to defend their individual clients.

The non-Marion County schools tried to present a united effort to resist the encroachment from the city into their domain as forcefully as possible. Other alternatives, such as voluntary acceptance of black students from IPS, were never seriously con-

[220]The reference is to the firing of special Watergate prosecutor Archibald Cox and the resignation of Attorney General Elliott Richardson and Assistant Attorney General William Ruckelshaus. Both resigned rather than carry out Nixon's order to fire Cox.

sidered.[221] In taking this position the elected school board members were undoubtedly accurately reflecting the desires of their constituents as well acting consistently with their own convictions. Some of the board members felt that even a public suggestion of compromise would be certain political suicide. Some of the defense lawyers pride themselves on the fact that the lawsuit did not become a heated political issue in the Indianapolis suburbs. These lawyers' efforts to ease tensions were no doubt valuable, but the principal reason the case did not result in political turmoil was that the vast majority of the people in the suburbs believed that maximum resistance was the only conceivable course to pursue. Any dissenters were deafeningly silent.

The independence of the suburban schools was only slightly diluted by the time of trial. The townships school corporations continued to be represented by their own counsel, but for purposes of trial there was a cooperative, voluntary separation of functions. A pattern developed whereby the positions taken by the leaders of this group of attorneys were routinely followed by other attorneys in the group.[222]

Each of the added school defendants made a prompt and vigorous effort to dispose of the case. The early pleadings indicated a substantial amount of duplication of effort. These pleadings demonstrate independent thought and legal research by each attorney, a characteristic which diminished as the case progressed. Despite all this independent effort, the new defendants responded in essentially the same manner. None took an approach drastically different in substance from any of the others, though various methods of presenting the legal positions were utilized.

Two principal legal responses were raised. First, the defendants contended it was basically unfair, and a violation of due process, to bring new defendants into the lawsuit after three years of litigation and apply the results of the already concluded trial to those defendants. Second, the defendants asserted the court had no judicial power over any suburban school until a finding was made that the school was guilty of unlawful segregation. The suburban schools were able to raise this jurisdictional issue at the early motion to dismiss stage because the Justice Department action which brought them into the case did not make any allegations that these additional school corporations were guilty of any unlawful discriminatory acts. The Justice De-

---

[221] Confidential personal interview.

[222] The attorneys for the Beech Grove City Schools and the school town of Speedway endeavored to separate their clients from the township school corporations. *Id.*

partment had merely served each defendant with a summons accompanied by a copy of the judge's order that the particular defendant be made a party to the case. The defendants' position was stated in terms of a constitutional absence of federal judicial power. The suburban schools argued that since there was not even an issue of whether any school was guilty of unconstitutional activity, the judicial power of the United States district court, as defined by article III of the United States Constitution, did not extend to the schools.[223]

---

[223]Several less basic legal positions were asserted by the added defendants as grounds for their immediate dismissal from the case. Some schools contended that their joinder was in violation of rule 20, the Federal Rules of Civil Procedure. Most defendants asserted that the court's order joining them was contrary to a provision of the Civil Rights Act, 42 U.S.C. § 2000 c-6. This statute empowers the Attorney General to initiate an action to desegregate schools and requires him to certify that he has received from a parent in the school district, a complaint alleging unlawful discrimination. The defendants charged the court's order joining them as parties was in violation of rule 7 of the local rules of the court. The defendants alleged that this rule afforded them a right to respond to the motion of the United States to join additional parties before the joinder order was signed by Judge Dillin. Some of the defendants challenged the sufficiency of the process which was used to bring them into the case. Some moved to dismiss the action on the grounds that rule 4(d), Federal Rules of Civil Procedure, had not been satisfied. This rule requiring service of the summons and complaint together, had allegedly not been satisfied because no complaint against them was filed. Some of the added schools asserted that the order bringing them into the case was in violation of rule 8(a), Federal Rules of Civil Procedure, because there was no demand for judgment or relief against the added defendants. There was a motion to dismiss on the ground that the requirement of rule 10, Federal Rules of Civil Procedure were not followed. Rule 10 establishes the form for pleadings. Another motion to dismiss was on the basis that there was not a pleading signed by an attorney as required by rule 11, Federal Rules of Civil Procedure. There was a motion to dismiss for failure to join indispensable parties, the position being made that all schools in the Indianapolis Metropolitan statistical area were indispensable parties, if any of these were to be joined. This position was afforded some dignity two years later when five more additional out-of-county schools were joined on the court's order.

One defendant charged that the action could not be prosecuted against it unless all members of the Indiana General Assembly were joined as defendants. This position was based on the proposition that "by reason of Article 8, § 1 of the Indiana Constitution the General Assembly has the exclusive right and power to determine how and by what instrumentality the education system of the State of Indiana shall be administered and carried into effect." IND. CONST. art. 8, § 1.

There was a motion to dismiss on the grounds that the requirements of rule 24, Federal Rules of Civil Procedure, had not been satisfied in that intervention was not timely, it raised no new issues, there was no showing that disposition of the case would impair or impede the ability of the plain-

One attorney at one point moved to dismiss on the basis of his very candid, if not discreet, statement that:

> the court has usurped the prerogatives of the original parties plaintiff and defendant to frame the issues and determine the parties to the litigation. . . . The Court has carried judicial activism to the illogical extreme where it and not the parties determine the course of litigation. Instead of serving as an impartial Judge, it has become an active participant in the litigation.[224]

Various forms of pleading were used by the new defendants to present these theories to dismiss the case against them immediately. Some defendants raised the same theory in different forms as many as three times during the fall of 1973. Most of the added defendants responded in a traditional way to the service of process by filing a pleading in the district court, usually a motion to dismiss. But some reacted more dramatically. The law professor immediately filed an original action in the United States Court of Appeals for the Seventh Circuit seeking an injunction preventing Judge Dillin from proceeding further with the case against his clients. This petition was based essentially on the two basic theories discussed above. The Seventh Circuit denied the petition before the end of September of 1973.

The attorney chose this unorthodox response because he felt his legal principles were valid but he did not feel they would be fairly considered by Judge Dillin.[225] This complaint would be frequently voiced by counsel for the added defendants during the course of the litigation. Regardless of the validity of the criticism in another context, it is particularly suspect when he and his clients had not yet appeared in the district court. This action established very early in the remedy stage of the case an adversarial relationship between Judge Dillin and defense lawyers.[226]

---

tiffs to protect their interests, and there was no showing that anybody was not adequately represented.

Several of the new defendants moved to dismiss the action against them on the grounds that the original lawsuit filed by the United States had been prosecuted to judgment and any action against them should be docketed as a separate action on the basis of rule 79(a), Federal Rules of Civil Procedure.

One of the defendants moved "for relief," from the court's order joining it as a party, on the basis of rule 60(b), Federal Rules of Civil Procedure, alleging that the judgment in the original action had been satisfied when IPS had filed a report describing how it would eliminate discrimination and the original plaintiff, the United States, had "acceded" to the report.

[224]Defendants' motion to dismiss.

[225]Confidential personal interview.

[226]The action in the United States Court of Appeals for the Seventh

The defense lawyers made many other efforts to obtain relief from the Seventh Circuit or the United States Supreme Court[227] before Judge Dillin took any action resembling a final order against them. Within six weeks after the September 7, 1971 order which joined the additional defendants there were at least six more pleas to the Seventh Circuit. Some of these pleadings suggest a frantic, irrational atmosphere. On September 27, 1971, one of the suburban school corporations petitioned the court of appeals for an order requiring Judge Dillin to rule on motions filed by the school on September 14, 1971 and September 21, 1971. The petition also prayed that the court of appeals enjoin the judge from proceeding further until he ruled on these pending motions. This all happened within three weeks of the order joining the school as a party. The motions at issue in this petition were ruled on by Judge Dillin on October 1, 1971, and the petition for a writ of prohibition was denied by the court of appeals on the same day.

In addition to the efforts to have the added defendants dismissed from the case, a basic objective of the added defendants was to take the case out of Judge Dillin's court, the judge responsible for their being brought into the case. The major effort in this regard was a protracted attempt to have the case heard by a three-judge federal court pursuant to 28 U.S.C. § 2281. The added defendants' principal difficulty was to find an issue involving a statute or regulation with statewide application.[228] Judge Dillin ultimately held there was no such statute or regulation at issue in the case and for that reason a three-judge court was not appropriate. This decision was affirmed by the Seventh Circuit.[229]

The flurry of legal maneuvers continued throughout the remainder of 1971. Judge Dillin held a pretrial conference with all attorneys on December 20, 1971. At the closed pretrial conference the judge reportedly tried to persuade the parties to negotiate a voluntary desegregation plan.[230] Following the 1971

Circuit for a writ of prohibition against Judge Dillin plainly was not solely responsible for the strained relationship between the judge and the attorneys.

[227]It is this writer's belief these interlocutory appeals and original actions in the appellate courts did not significantly delay the litigation in district court.

[228]The United States Supreme Court has interpreted 28 U.S.C. § 2281 as requiring a three-judge district court only when the state statute under challenge is one having statewide application. *See, e.g.*, Moody v. Flowers, 387 U.S. 97 (1967).

[229]United States v. Board of School Comm'rs, 503 F.2d 68 (7th Cir. 1974), *cert. denied*, 421 U.S. 929 (1975).

[230]If Judge Dillin's subsequent efforts to settle the case are a reliable guide to what transpired in 1971, he likely used strong language. At a pre-

pretrial conference, the judge entered a blanket order on December 30, 1971, denying all pending motions.[231] Of all the voluminous procedural pleadings which had been filed since September 7, 1971, only the three-judge court issue was left unresolved by the district court.

This sweeping and symbolic order had an obvious impact.[232] The defendants appear to have accepted for the first time that it was inevitable they would have to litigate the issues. Within two weeks of this order several of the defendants voluntarily withdrew appeals pending in the court of appeals and the added defendants began to file answers to the complaint of the intervening plaintiffs Buckley.

Whatever the effect of the judge's order on December 30, 1971, the only significant activity in court during all of 1972 was the sideshow in September involving Schools 111 and 114.

V. The 111-114 Controversy

IPS School 114 was new when schools opened for the fall term of 1972. The controversy surrounding the opening of the new school was a heated emotional event in Indianapolis and one which may have had significant long term ramifications nationally as well as in Indianapolis. School 114 was erected three blocks from School 111 to facilitate increased enrollment in the School 111 district in the extreme southeastern portion of the IPS system. The School 111 district had historically been all white. School 111 was an all-white school until two low income public housing projects opened in the neighborhood in 1971. When the two projects came to be inhabited almost totally by blacks, the traditional racial composition of School 111 was drastically altered.

When IPS made plans to open School 114 in the fall of 1972, it was operating under the orders issued by Judge Dillin as part of his decision finding IPS to be unlawfully segregated on August 18, 1971. On June 6, 1972, the IPS board approved Resolution 1020,[233] which established School 114 as a K-6 school. All 7th-

---

trial conference three years later in December 1974, Judge Dillin told the assembled attorneys (including this writer) that they could either make a good faith effort to settle the case or they could "roll the dice" with their corporate existence at stake.

[231]Motions which were denied in this order included motions to dismiss, motions to docket the action separately, motions for more definite statement, motions to strike, motions suggesting that the action was not properly prosecuted by the intervening plaintiffs as a class action, and motions requesting the court's abstention. Entry 12/30/71.

[232]The ruling is symbolic in that it came on the next to the last day of the year indicating Judge Dillin's desire for a fresh start in 1972.

[233]Minutes, book mmm, at 2341 (1971-72).

and 8th-grade students in the district would attend School 111. School 114 was designed to be a model experimental school (revolutionary for IPS) utilizing such educational techniques as open classrooms, and the 114 building was constructed with open classrooms. IPS Resolution 1020 assigned students from a portion of the School 111 district to School 114 for the 1972-73 school year. IPS predicted that under Resolution 1020 School 111 would be 38.4 percent black and School 114 would be 39.5 percent black.

Less than one month after Resolution 1020 was approved, there was a change in the membership of the IPS Board. In the May 1971 election, seven new school board members were elected. The successful slate of candidate had campaigned on an anti-busing platform with a commitment to resist forced integration. Four of these newly elected members took office on July 1, 1972;[234] the other three would commence their 4-year term on July 1, 1974.[235]

On August 21, 1972, two weeks before the first day of classes, the new IPS Board adopted Resolution 1027,[236] which repealed Resolution 1020. Resolution 1027 made significant changes in the organization of School 114 and its relationship with School 111. The new resolution altered the IPS majority-to-minority transfer rule by providing that kindergarten pupils assigned to School 114 would have the option of attending School 111. The resolution changed School 114 to a K-8 school, providing that some junior high teachers would teach at both schools, since there were not enough students for two complete junior high school programs. The resolution eliminated the experimental program at School 114 and ordered immediate construction to convert the open classrooms to traditional classrooms and to add facilities for the junior high classes. The resolution altered the district boundaries for the two school so the predicted enrollment for the fall term would be 31.8 percent black for School 111 and 47.7 percent black for School 114.

Some of the black residents of the two housing projects in the area believed the changes in the new school were racially motivated and felt the elimination of the anticipated innovative programs would adversely affect the quality of the education their children would receive. On Friday, September 1, 1972, resi-

[234]The board members who took office on July 1, 1972 were Carl Meyer, Constance Valdez, Paul Lewis, Lester Neal. Minutes, book nnn, at 1 (1972-73).

[235]The board members who took office on July 1, 1974 were Martha McCardle, William M.S. Meyers, Fred Ratcliffe. Minutes, book ppp, at 7. (1974-75).

[236]*Id.*, book nnn, at 212 (1972-73).

dents of the project consulted lawyers of the Indianapolis Legal Services Organization (LSO).[237]

School opened as scheduled on Tuesday, September 5, 1972, with the new Resolution 1027 dictating the operation of School 114, except that the required construction was in progress. It was estimated the construction would continue for four months. On September 7, 1972, LSO lawyers filed, on behalf of three black mothers from the projects and their children, a motion to intervene in the IPS school desegregation case. The intervenors, proceeding in forma pauperis, sought to enjoin the changes ordered by Resolution 1027 and to have the board members held in contempt of court for acting contrary to the court's orders of August 18, 1971.

The intervenors alleged the optional zone for kindergarten was inconsistent with a new IPS majority-to-minority transfer policy which was adopted pursuant to the court's order. The policy provided a student could transfer only when he was in the racial majority at his school, and then he could transfer only to any school where he would be in the minority. The intervenors further alleged the opening of School 114 with 47.7 percent black students violated the court's order that no school, not already over the tipping point of 40 percent black students on August 18, 1971, would be permitted to go past that point pending formulation of a final remedy for the case. The intervenors also alleged the elimination of the innovative features of School 114 denied them an equal educational opportunity, *i.e.* denied them equal protection.

The intervenors' application for a temporary restraining order was denied, but Judge Dillin set the motion for a preliminary injunction to be heard by the court on the following Wednesday, September 12, 1972. At the preliminary injunction hearing IPS board members and administrators testified as to the reasons for the last minute changes. They testified that discipline was so deteriorating at School 111, especially with the black 7th- and 8th-grade students from the housing projects, that it was necessary to transfer some of them to School 114. The open classrooms at 114 would in their opinion hinder efforts to control students.[238] The board members testified that it was their understanding, based on a vague reference to advice of counsel, that the court's tipping point order did not apply to new schools.[239] As precedent

---

[237]Confidential personal interview.

[238]See generally testimony of Karl Kalp, Sept. 14, 1972. Record, vol. II, at 242-301; testimony of Carl J. Meyer, Sept. 13, 1972. *Id.*, vol. I, at 202-35; testimony of Kenneth T. Martz, Sept. 14, 1972. *Id.* at 302-18.

[239]Cross-exam of Carl Meyer by Mr. Moss, Sept. 13, 1972. *Id.* at 223; cross-exam of Carl Meyer by Mr. Larson, Sept. 13, 1972. *Id.* at 230.

they cited the unchallenged opening of School 48 in September of 1971, immediately after the order, with over 90 percent black enrollment.[240]

The board's action demonstrated a significant and immediate change in IPS philosophy when the new board members took office on July 1, 1972, accompanied shortly thereafter by a new superintendent of schools. The original plans for School 114 were conceived by the retiring school board and its superintendent Stanley Campbell. When the new board members took office on July 1, 1972, one of their first acts was to fire Stanley Campbell[241] and replace him with Karl Kalp, a career IPS teacher and administrator. Kalp testified at the hearing that there was no evidence the open classrooms planned for School 114 would provide a superior educational advantage.[242]

The new board members took the 111-114 issue as an opportunity to demonstrate to the community that they intended to actively pursue their political objectives. The issue also gave the new board members an opportunity to demonstrate their courage to challenge Judge Dillin and at the same time test his determination. The controversy probably resulted from the rhetoric of the election campaign. Superintendent Kalp testified that but for a petition from white parents in the 111-114 district the changes likely would not have been made.[243] These parents were undoubtedly encouraged by the anti-integration theme of the school board campaign.

At the conclusion of the hearing on Saturday morning, September 16, 1972, Judge Dillin gave his ruling as part of a wide-ranging 2-hour oration from the bench, in the presence of all seven members of the school board.[244] Judge Dillin held that the school board had succumbed to pressure from white parents in the district to make School 111 a white school and School 114 a black school. The judge found that in responding to these demands the board had violated the court's order of August 18, 1971, and had also committed a new separate act of unlawful segregation.

The judge ordered Resolution 1027 annulled and Resolution 1020 reinstated. This meant all junior high students would go back to School 111, kindergarten pupils would attend the school

---

[240]See, *e.g.*, cross-exam of Robert De Frantz, Sept. 13, 1972. *Id.* at 165.

[241]One of the campaign promises of the successful slate of candidates in the 1972 election was that Stanley Campbell, the IPS Superintendent of Schools, would be fired immediately.

[242]Direct exam, Karl Kalp, Sept. 14, 1972. Record, vol. II, at 252.

[243]*Id.* at 260-61.

[244]Statement and findings by the court, Sept. 15, 1972. *Id.*, vol. III, at 397-442. The ruling was issued in written form on Sept. 28, 1972.

in their district, and School 114 would utilize open classrooms. The ongoing construction at School 114 was reversed.

Judge Dillin did not hold the board members in contempt of court but severely reprimanded them for taking the action without approval from the court.[245] The judge characterized his 2-hour lecture as a civics lesson for board members. In recognition of the recent campaign, Judge Dillin told the board members he understood the facts of political life. He said they could campaign on any platform they wanted, but if their proposals were unlawful, as they were here, the campaign promises could not be carried out.[246]

In promulgating a remedy, Judge Dillin ordered actions which had not been requested by LSO lawyers. Evidence at the trial had revealed actual black student enrollment at both schools was significantly higher than the projected figures used by IPS prior to the opening of school. Actual enrollment figures showed School 111 opened with 37 percent black students and School 114 with 52 percent black students. The black student population for the two districts combined was 45.2 percent.[247] Judge Dillin said these figures demonstrated that the tipping point, at least for this neighborhood, was obviously lower than 40 percent.[248] Judge Dillin ordered IPS to submit immediately a plan for reducing the enrollment at both schools to not more than 35 percent black students. The only proviso was that this level not be reached by one-way busing of black students out of Schools 111 and 114. The school board's response was to exchange black students at Schools 111 and 114 with white students from two other nearby schools, Schools 21 and 82.

On Thursday, September 21, 1972, the school board held a meeting to discuss a plan to be submitted to the court. Simultaneously IPS administrators planned meetings at each of the four schools to meet with parents. A large number of white parents left the IPS meeting at School 21 and School 82 to descend en masse on the school board meeting. The white parents were angry and disruptive. Indianapolis police were called, and responded with a sizable force to control the crowd. The purpose of the demonstration was said to be for the white parents to advise the school board that they would boycott the school if the court's order was implemented.[249]

---

[245]Statement and findings by the court, Sept. 15, 1972. Record, vol. III, at 397-442.

[246]*Id.* at 426.

[247]It is believed these statistics demonstrate substantial white flight from the 111-114 neighborhood during the summer of 1971.

[248]Statement and findings, *supra* note 245, at 439.

[249]Star, Sept. 22, 1972, at 1, col. 2.

Once the crowd was controlled, the board voted to approve the staff proposal for complying with the court order. The seven-member board voted four to zero to approve the plan. Three of the four newly elected board members abstained. One of the abstaining members was quoted by the *Indianapolis Star* as saying she could not vote for the plan because it contemplated busing, but she would not vote against it for fear of a contempt of court citation.[250] The board also voted to appeal the court's order.

The next day, Friday, September 22, 1972, IPS attorneys[251] traveled to Terre Haute, Indiana, where Judge Dillin was conducting a trial, to plead for a stay. In a brief pleading, IPS attorneys alleged "a volatile and potentially uncontrollable situation" existed at the schools. Judge Dillin granted a stay of the portion of the order which involved Schools 21 and 82 pending appellate review of the order and the August 18, 1971, decision.[252] The rest of the 111-114 order remained effective, but the disruptive activities of the white parents had been successful in obtaining their objective of preventing the busing of their children.

The LSO involvement in the case was an emotional issue in Indianapolis and drew national attention through the presidential campaign commentary of Vice President Spiro T. Agnew. Agnew was highly critical of Office of Economic Opportunity-financed lawyers becoming involved in school desegregation litigation. Agnew frequently pointed to the Indianapolis case as an example. It is believed the attention drawn to the Indianapolis case by Agnew was a factor which led to a provision of the Legal Services Corporation Act, which prohibits the use of Legal Services Corporation funds for "legal assistance with respect to any proceeding or litigation relating to the desegregation of any elementary or secondary school or school system."[253]

---

[250] *Id.* The three board members who refused to vote were Paul E. Lewis, Lester Neal, and Constance R. Valdez.

[251] The IPS Board was represented by new legal counsel at the 111-114 trial. During the May 1972 campaign, the successful slate of candidates had pledged to fire Baker & Daniels as school board counsel. This proposal was a companion to the pledge to fire Superintendent Stanley Campbell. Shortly after the new board members assumed office on July 1, 1972, Baker & Daniels was replaced as legal counsel for IPS by the Indianapolis firm of Bredell, Martin, and McTurnan. Lawrence McTurnan of that firm has been principal counsel for IPS since that time. On July 6, 1976, four newly elected board members took office and promptly appointed Bamberger and Feibleman as the board's new legal counsel.

[252] The court's order regarding schools 111 & 114 was affirmed by the United States Court of Appeals for the Seventh Circuit. 474 F.2d 81 (7th Cir. 1973).

[253] 42 U.S.C. § 2996f(b)(7) (Supp. IV, 1974).

The participation of LSO in the case was also politically unpopular in Indianapolis and ultimately played a role in its losing about one-third of its funding.[254] In 1972, approximately one-third of roughly one-half million dollars was received from the Department of Housing and Urban Development Model Cities program. This money was allocated by the Indianapolis City-County Council. The bulk of the remainder of the LSO budget came directly from the Office of Economic Opportunity. When the question of refunding LSO for 1973 was discussed by the city-county council in the fall of 1972, there was formidable opposition and extended public discussion. The funding was approved only after stringent restrictions were placed on LSO lawyers. One year later, the debate was renewed and the funding was withdrawn.[255]

Another Indianapolis institution felt the bite of the school desegregation case as a result of the 111-114 controversy. The Indianapolis Urban League operated a social service program at Clearstream Gardens, one of the housing projects in the 111-114 district. When the residents of this project became involved in the 111-114 issue the Urban League petitioned to participate as amicus curiae.[256] As a result of this involvement, the Urban League, which receives nearly all of its funds from the Indianapolis United Way, nearly lost its funding.[257]

Inspired primarily by the *Westside Messenger*, a neighborhood newspaper, a demonstrable number of industrial employees in Indianapolis withheld their pledges to the United Way during the 1973 fund-raising campaign. The United Way responded by imposing new guidelines on the advocacy activities of affiliates. No specific guidelines were ever adopted, but the United Way made it clear that if an issue as emotional as the busing issue came along again, and an agency's involvement in the issue hampered United Way fund raising, the agency would not be further funded.[258] The *Indianapolis News* reported that during the 1973 United Way Campaign, IPS Board member Fred Ratcliff introduced a resolution proposing that the IPS Board request that IPS employees refuse to contribute to United Way if the funds "go to groups whose policies are inconsistent with this board's."

A lawsuit was filed in Marion County Circuit Court to enjoin United Way from funding Urban League. The circuit court

[254]Confidential personal interview.

[255]*Id.*

[256]Motion for leave to file brief amicus curiae, September 13, 1972.

[257]This author participated in the controversy as a member of the Board of Directors and subsequently as vice president of the Indianapolis Urban League.

[258]Confidential personal interview.

judge was John Niblack, the judge who tried to obtain impeachment of Judge Dillin for his actions in the school desegregation case. Judge Niblack had earlier stated that he was withholding his personal contributions to the United Way as long as it funded the Urban League and as long as the Urban League was "pro busing."[259] Many people felt, but nobody ever proved, that Niblack was personally responsible for the case being filed in his court. The case was venued out of Marion County at the earliest possible moment and was eventually dismissed.[260]

VI. The 1973 Remedy Trial

A. The Issues

When the remedy trial[261] commenced on June 12, 1973, defense counsel were very dissatisfied with the specification of issues and with what they characterized as totally inadequate response to their pretrial discovery efforts.[262] The defense lawyers held Judge Dillin and the attorneys for the intervening plaintiffs responsible for these two grievances. The lack of specification of issues is in large part attributable to the fact that the law relating to interdistrict remedies was in the early stages of development. The burdens of litigating a developing area of law, always a factor in this case, were particularly noticeable during the 1973 trial.

Several significant and symbolic events occurred during the course of the trial which demonstrated the level of uncertainty. On the first day of the trial, the United States Court of Appeals for the Sixth Circuit, sitting in Cincinnati, Ohio, a hundred miles away, decided the case of *Bradley v. Milliken*.[263] *Milliken* was the

---

[259]See letter, Niblack, J. to Craine, J., Intervening Plaintiffs' Exhibit 5. Record, vol. IV, at 725.

[260]The *Indianapolis News* reported that during the 1973 United Way campaign IPS Board member Fred Ratcliff introduced a resolution proposing that the IPS Board request IPS employees to refuse to contribute to United Way if the funds "go to groups whose policies are inconsistent with this board's." Reggie Bishop of the *News* reported that "although Ratcliff did not single out any particular organization in his proposal, a memo from him to school board members specifically cited the Indianapolis Urban League." News, Sept. 5, 1973, at 15, col. 1.

[261]This segment of the case is frequently called the remedy trial. The suburban school defendants have persistently objected to this designation. It is their position that no suburban school can be included in the remedy desegregating IPS until the court has made a finding that the suburban school has committed a constitutional violation.

[262]Confidential personal interview.

[263]484 F.2d 215 (6th Cir. 1973), *rev'd*, 418 U.S. 717 (1974).

first decision in which a United States court of appeals had upheld a desegregation plan ordering an interdistrict remedy.[264]

During the course of the trial, the United States Supreme Court decided *Keyes v. School District No. 1.*[265] Prior to *Keyes,* there was discussion about which specific schools in the IPS system had been found to be de jure segregated. After the Supreme Court's opinion in *Keyes,* it was generally accepted that at a minimum the entire IPS system would be involved in the desegregation plan. Finally, during the course of the trial the United States Supreme Court denied certiorari to the Seventh Circuit decision affirming Judge Dillin's August 18, 1971, order which found IPS unlawfully segregated.[266] Judge Dillin's frame of mind regarding the state of the law was aptly summarized from the bench when he said, "Really we are out here in the wilderness without much precedent one way or the other."

The issues were at least partially framed by the amended complaint of the intervening plaintiffs Buckley. The Buckley complaint contained two prayers for relief. The complaint asked the court to

> adjudge, decree and declare that . . . [two Indiana statutes][267] are unconstitutional, null, and void, insofar as they effect racially separate public schools and school systems in Marion County and the Indianapolis metropolitan area.[268]

This is the pleading which raised issues regarding the impact of Uni-Gov on the desegregation of schools. Buckley's second prayer for relief asked the court to create a countywide school system in Marion County.[269]

---

[264]The United States Court of Appeals for the Fourth Circuit had previously held that an interdistrict remedy was not legally possible. Bradley v. School Bd., 462 F.2d 1058 (4th Cir. 1972), *aff'd per curiam by an equally divided Court,* 412 U.S. 92 (1973).

[265]413 U.S. 189 (1973). In *Keyes,* the Court held that a finding of unlawful segregation in a "meaningful portion" of a school system constitutes a prima facie showing of unlawful discrimination throughout the system. Thus, a systemwide remedy is required unless the school can prove the segregation in the other segments of the system is unintentional.

[266]Board of School Comm'rs v. United States, 413 U.S. 920 (1973).

[267]IND. CODE § 20-3-14-1 (Burns 1975), a statute regulating school corporation annexation in Marion County, Indiana; *id.* § 18-4-1-1 (Burns 1974), the Indianapolis Marion County unified government bill and the companion "freeze of IPS boundaries."

[268]Amended Complaint at 7 (filed Oct. 21, 1971).

[269]The second prayer for relief of the amended complaint read,

> Plaintiff-intervenors further pray that the defendants, their agents, servants, employees, and all persons in active concert or par-

Some further illumination of the issues being tried, at least the court's perception of the issues, is found in the opinion filed by Judge Dillin at the conclusion of the trial. While it is recognized that this statement came after the trial, Judge Dillin probably explained his understanding of the case to counsel in essentially these terms at the pretrial conference held the day before the trial.

In the opinion Judge Dillin said,

> The issues of fact submitted for trial are as follows:
>
> 1. Whether or not desegregation of IPS within its present boundaries (sometimes referred to as an "Indianapolis Only Plan") can be accomplished as required by the equal protection clause of the Fourteenth Amendment in such a manner as to "work," within the meaning of Green v. County School Board: "The burden on a school board today is to come forward with a plan that promises realistically to work . . ."
>
> 2. Whether or not any of the added defendant officials of the State of Indiana, their predecessors in office, or the added defendant The Indiana State Board of Education have acted to promote segregation, or failed to carry out duties imposed upon them by law in such a manner

---

ticipation with them be preliminarily and permanently enjoined and restrained to take forthwith all steps reasonably necessary to secure to plaintiff-intervenors their right to attend racially nonsegregated and nondiscriminatory schools and school systems, including if necessary:

(a) the consolidation or merger of the defendant school systems in all respects of school operation and administration, including but not limited to, the appointment of an acting superintendent to manage the consolidated systems, the merger of the existing Boards of Education pending the selection by election, appointment, or otherwise of a new Board of Education representative of the consolidated system, and further requiring that board shall be the successor Board of Education for the defendant school systems assuming all rights, powers, responsibilities, duties, and obligations presently held, in whole or in part, by the defendant school boards; and further requiring that each defendant shall, by withholding of funds or accreditation and by the exercise of any and all powers available to each, insure the full cooperation of the other defendants and the prompt accomplishment of said consolidation or merger; or

(b) the adoption and implementation by all defendants of such agreements, contracts, or other arrangements with respect to the operation of educational systems in the Indianapolis metropolitan area as will secure to plaintiff-intervenors equal educational opportunities in non segregated and non discriminatory schools and school systems.

Id. at 7-8.

as to promote segregation or inhibit desegregation within IPS.

3. Whether or not any of the added defendant school corporations have acted to promote segregation either within IPS or within their own boundaries.

The issues of law presented are as follows:

1. Whether or not acts of *de jure* segregation heretofore found to have been practiced by IPS can be imputed to the State of Indiana such that appropriate State officials or agencies may be directed to afford relief to vindicate the Fourteenth Amendment rights of plaintiffs and their class.

2. Whether or not appropriate State officials or agencies have the power to direct reorganization of IPS with other school corporations, or to direct the transfer or exchange of IPS pupils to or with other school corporations in order to vindicate such rights.

3. Whether or not this Court may act in the manner just described to vindicate such rights if responsible officials or agencies of the State fail to do so within a reasonable time.[270]

The first issue before the court was whether IPS could be satisfactorily desegregated within its own territory. Judge Dillin had to decide whether an IPS-only desegregation plan would satisfy the requirements of *Brown II*[271] and *Green v. County School Board*.[272] The parties did not seem to have any trouble identifying evidence which was relevant to this issue. The difficulty was with the second issue. Assuming Judge Dillin found that an IPS-only plan would not be a satisfactory remedy, what principles of law would permit or require him to order a remedy including the suburban schools?[273] The lawyers' difficulty was in knowing what facts would be relevant to prove the presence or absence of these principles.

---

[270]United States v. Board of School Comm'rs, 368 F. Supp. 1191, 1197 (S.D. Ind. 1973).

[271]349 U.S. 294 (1955).

[272]391 U.S. 430 (1968) (referring to a plan that will realistically work).

[273]368 F. Supp. at 1197-1205. The lawyers for the suburban schools were convinced from the outset that Judge Dillin would find that an IPS-only plan would not be satisfactory. In the 1971 opinion Judge Dillin said,

> the easy way out for this Court and for the Board would be to order a massive "fruit basket" scrambling of students within the School City during the coming school year, to achieve exact racial balancing, and then to go on to other things. The power to do so is undoubted. There is just one thing wrong with this simplistic solution: in the long haul, it won't work.

332 F. Supp. at 678.

John O. Moss and John Preston Ward, attorneys for the Buckleys, suggested several theories during the trial as a basis for an interdistrict remedy. They argued that both the State of Indiana and the suburban schools had an affirmative responsibility to eliminate the unlawful segregation in the Indianapolis metropolitan area, and their failure to fulfill this affirmative responsibility was the basis for including suburban schools in the desegregation plan ordered by the court.[274] Furthermore, intervening plaintiffs attempted to prove the suburban schools were guilty of discriminatory practices in the hiring of teachers and non-certified staff personnel, proposing this discrimination as a basis for including them in the desegregation plan. The intervening plaintiffs continued to pursue a "Uni-Gov theory" without any clear specification of the relevance of Uni-Gov. In his closing argument, one of the attorneys asked the court to "declare Uni-Gov unconstitutional."[275] There were some vague references during the course of the trial to acts of segregation by the Housing Authority of Indianapolis in the placement of public housing projects, but this issue was not fully litigated. Mr. Moss also suggested at one point that the suburban schools had located their school buildings on sites that had the effect of perpetuating all-white schools in the district.[276]

---

[274]This theory would not necessitate a showing of unlawful discrimination by either the state officer defendants or the suburban school defendants. The basis of their involvement in the remedy would be the failure to perform an affirmative obligation to eliminate segregation caused by the unlawful acts of IPS.

[275]Record, vol. XV, at 262-63 (July 6, 1973); opening statement, Mr. Moss, June 12, 1972, record, vol. I, at 3. A judicial declaration that Uni-Gov is unconstitutional would not assist in the desegregation of IPS schools. The only result of such a decision would be that the boundaries of the Civil City of Indianapolis would recede to the old city limits, a separate city council and county council would be reinstituted and the various unified administrative departments of government would be dismantled. It is unclear whether the repeated prayers of the counsel for the intervening plaintiffs to declare Uni-Gov unconstitutional are the result of an imprecise specification of issues or whether they were actually attempting to use the school desegregation case as a way of getting rid of Uni-Gov.

[276]This issue was not pursued by the intervening plaintiffs in their presentation of evidence and has not been an issue in the case. At the time of trial only two of the suburban districts (Pike and Washington Townships) had a large enough percentage of black students that isolation of blacks could conceivably have been a factor in their decisions relating to the location of schools. Washington Township schools had an excellent record of race relations. Judge Dillin commented during the course of the trial that had all other school systems acted similarly to Washington Township none would be in court.

B. Litigation Strategies

The independence of the suburban school districts continued throughout the trial. There was discussion among counsel for suburban schools about choosing a chief trial lawyer for the group and delegating to him the principal trial responsibility.[277] Due to what the individual suburban schools, or their lawyers, perceived as diverse interests, this was not done. Each of the 20 suburban schools districts was represented at the trial by counsel; each had complete freedom to call witnesses, present evidence, cross-examine witnesses, raise objections to evidence and conduct the litigation as he deemed appropriate. Despite this formal independence the defense of the township schools was a cooperative effort. Areas of factual development and cross-examination were loosely assigned to lawyers and this arrangement was respected by the defense lawyers. In the words of one of the unofficial leaders of this group of lawyers, "All of the attorneys acted with great restraint."[278]

The burden of such a large group of defendants was minimized by a ground rule established by Judge Dillin the first day of trial. When an evidential objection was made by a defendant, the objection would be deemed to have been raised by each defendant unless a defendant opted to be excluded from the objection. This ruling came about the second time an objection was made and 19 lawyers automatically stood in order and said, "Your honor, we join in that objection."

The schools outside Marion County did not participate in the cooperative defense of the township schools. These schools attempted to emphasize the differences between schools inside and outside Marion County. In an incident reminiscent of international politics, their attorney demanded and got a separate counsel table for non-Marion County school defendants. This strategy was based on the very pragmatic position that even if Judge Dillin decided to order a metropolitan plan, he might be persuaded to limit the plan to Marion County.[279]

The strategy of the state officer defendants[280] is difficult to evaluate. These defendants would not be concretely affected by the decision in the same way as the suburban schools. It appears their strategy was to resist as forcefully as possible whatever the court tried to do and to defend as a matter of principle the honor and integrity of the officials of the State of Indiana. Apparently,

---

[277]Confidential personal interview.

[278]*Id.*

[279]*Id.*

[280]The Governor, the Attorney General and the Superintendent of Public Instruction.

this strong resistance was motivated by a political philosophy which does not tolerate a federal court's reviewing the actions of state officials and local school authorities.

The United States continued as the "plaintiff" in the case but during this trial the Justice Department was more nearly aligned with the defendants than with the intervening plaintiffs. The position of the Justice Department was reported to the court in the opening statement of the Justice Department lawyer:

> [T]he United States has stated no claim against the added defendants here, such as the claim stated by the plaintiff intervenors. As we stated in our pre-trial submission in December of 1971, if it is shown that the added defendants have engaged in inter-district violation, that is to say a constitutional violation that in some manner involves two or more school systems, then some relief against them may be warranted. On the other hand, if no inter-system violation is shown, we do not believe that either the facts to be adduced at this hearing or the laws of the United States, would authorize the imposition of an inter-district remedy.
>
> The record will show that an intra-system desegregation plan can feasibly be fashioned and implemented in Indianapolis.[281]

This position of the Justice Department left counsel for the intervening plaintiffs as the only lawyers presenting evidence which would support an interdistrict remedy. It is difficult to evaluate the performance of these two lawyers, but the fact that they were out-gunned cannot be ignored. Without regard to the relative abilities of the lawyers, the resourses which were available to the two sides made the trial a mismatch. John Moss is a member of a three-person law firm in Indianapolis and John Ward is a sole practitioner. In opposition were school law specialists and trial lawyers from prominent Indianapolis firms; two law professors; a trial lawyer from the United States Department of Justice in Washington, D.C.; a lawyer from the office of the Indiana Attorney General; Corporation Counsel for the City of Indianapolis; and at least six other attorneys. One of the favorite luncheon topics of conversation of lawyers in downtown Indianapolis during June of 1973 was the "massacre in federal court."[282]

---

[281]Record, vol. I, at 8-9 (June 12, 1973).

[282]Some individuals and organizations attempted to assist the intervening plaintiffs during the course of the trial. This author, at the request of the Indiana Civil Liberties Union, provided support for the intervening plain-

Given the limited resources available to counsel for the intervening plaintiffs and the cast disparity of person power, it is not surprising the case for a metropolitan plan was not as expertly presented as it might have been. The *Indianapolis Star* reported that Judge Dillin frequently interrupted questioning by counsel and took over the examination of a witness himself.[283] This practice drew the ire of defense counsel, who charged in open court that Judge Dillin was acting as an advocate rather than as a judge.[284] During the course of the trial, Moss and Ward were frequently criticized for not preparing witnesses prior to calling them to testify. Some witnesses commented that they did not know why they had been called to testify.[285] One attorney implored the judge to speed up the direct examination of witnesses, reminding the court that since there were 20 school corporations represented at the trial and they were paying their lawyers at least $50 an hour, the trial was costing the taxpayers of central Indiana about $1,000 an hour.[286] Judge Dillin at one point candidly pleaded with the attorneys to prepare their witnesses before putting them on the witness stand, saying, "I've done it all my life."[287]

C. The Evidence

The absence of clear, controlling legal principles resulted in the introduction of volumes of evidence having marginal relevance. The most obvious example of time-consuming, interesting, but largely irrelevant evidence is the testimony of the superintendents of the suburban schools. Intervenors' counsel called 20 suburban school superintendents to the witness stand.[288] Their testimony

---

tiffs, limited research, and consulation on a narrow question of constitutional law.

[283]Star, June 14, 1973, at 31, col. 1.

[284]*Id.*

[285]Norman Morford, the deputy director of the Indiana Civil Rights Commission testified that he was in court because the director who was to testify was not available. Record, vol. I, at 79 (June 12, 1973).

[286]Star, June 15, 1973, at 39, col. 1.

[287]Record, vol. II, at 382 (June 13, 1973).

Those who are critical of plaintiffs' attorneys point to the brief they filed in the United States Court of Appeals for the Seventh Circuit as tangible evidence of inadequacy. The brief for the appeal from a two-week trial was less than 20 pages long. One-half of the brief was devoted to the question of whether the attorneys were entitled to attorney fees. On a brighter note, during a hearing Judge Dillin once commented that an oral argument presented by one of them was the most eloquent he had heard during the time he was on the bench.

[288]James R. Bales, Beech Grove, Record, vol. III, at 593-94; Earl Blemker, Greenwood. *Id.* at 493; William R. Curry, Mooresville. *Id.* at 581; H. Dean

provides a vivid picture of essentially all-white school systems, students, teachers, administrators and employees, in all but two of the suburban schools. The testimony does not, however, have any direct bearing on either of the two basic issues being tried: whether an IPS-only plan would result in resegregation of the IPS system and whether there was a legal basis for an interdistrict remedy. The lengthy testimony of these witnesses might be justified as an effort to unearth evidence of interdistrict violations, were it not for the fact that the intervening plaintiffs had deposed most of the superintendents prior to trial.

Intervenors attempted to show an absence of affirmative action by the suburban schools to eliminate the all-white aspect of their systems. This was clearly proven, except for Washington Township, but the courts have never accepted the proposition that the suburban schools have an obligation to promote integration. The attorneys for the intervening plaintiffs established that no significant black studies existed in any of the suburban schools. This is not surprising, since they do not have many black students, but it does not seem to have any legal significance. Counsel asked each of these witnesses about their land holdings for expansion. Most of the suburban schools had land available, but the relevance of that fact was never established. The superintendents were each asked about federal funds at their schools and many replied they received federal funds of one kind or another. It does not appear, however, that counsel ever argued that the receipt of federal funds was a legal ground for an interdistrict remedy.

Intervenors' attorneys established by testimony of school administrators that 78.7 percent of all the students in defendant suburban schools are bused to school. All of the Marion County township schools bused more than 75 percent of their students in 1971-72, six of the eight township schools bused more than 80 percent and two bused more than 90 percent. Speedway had no busing and Beech Grove bused 62 percent of its students in 1971-72. These statistics may cast doubt on the sincerity of groups

---

Evans, Washington Township. *Id.* at 427; Robert D. Hartman, Carmel-Clay. *Id.* at 603; Hubert R. Haynes, Brownsburg. *Id.*, vol. V, at 997; Frank Hunter, Perry. *Id.*, vol. III, at 515; Charles O. Jordan, Pike Township. *Id.*, vol. II, at 337; Robert L. Mason, Franklin Township. *Id.*, vol. V, at 907; Bernard Keith McKenzie, Lawrence. *Id.*, vol. III, at 505; Pearson Miller, Mt. Vernon. *Id.*, vol. V, at 880; Wendell Peterson, Greenfield Central. *Id.*, vol. VI, at 1202; David Rankin, Avon. *Id.* at 1129; Harold R. Sharpe, Eagle Union. *Id.* at 1144-56; Sidney Spencer, Wayne Township. *Id.*, vol. V, at 859; Roger Sturm, Plainfield. *Id.*, vol. III, at 477; Austin Walker, Warren Township. *Id.* at 557-58; Dale Weller, Speedway. *Id.* at 539; and Edwin White, Decatur Township. *Id.*, vol. V, at 968.

which oppose busing, but they do not provide a basis for an inter-district remedy.

The most significant evidence was the opinion testimony of the expert witnesses regarding the question of whether an IPS-only plan would cause IPS to resegregate by becoming all, or nearly all, black. As Judge Dillin pointed out in his opinion, the experts disagreed.[289] Two kinds of experts testified. Some of the experts were persons with academic credentials, usually in sociology or demography.[290] The other experts were community leaders or participants in social service activities in Indianapolis, whose expertise was based not on academic credentials, but on a working knowledge of Indianapolis and its people.[291] The expertise of this latter group of witness was strenuously challenged by the defendants, but in most cases the court permitted them to give opinions about demographic trends in Indianapolis.

The critical testimony of all of these witnesses was their opinion as to whether the IPS would continue to have a greater percentage of black students and their projections for the racial balance of IPS. Dr. Dan W. Dodson testified that straight-line projections of racial composition of metropolitan areas were (in 1973) no longer valid.[292] He testified that the trend of more blacks in the inner cities and whites fleeing to the suburbs was over. That trend, he testified, was caused by a migration of poor blacks from rural locations to the inner cities, an exodus of

---

[289]Although they disagreed, the judge's opinion was that there was no viable IPS-only plan. 368 F. Supp. at 1198.

[290]The academic experts were Dr. Dan W. Dodson, Professor of Sociology, Southwestern University. Record, vol. XIV, at 2252; Dr. Charles A. Glatt, Professor, demographer and director of the Midwest Institute, a desegregation center at Ohio State University. *Id.*, vol. IV, at 729, 731-32; Dr. Clifford P. Hooker, Professor of Educational Administration, University of Minnesota. *Id.*, vol. XI, at 2077; Dr. John T. Liell, Professor of Sociology and a demographer, Indiana University-Purdue University at Indianapolis. *Id.*, vol. V, at 1013; Dr. Jane R. Mercer, Professor of Sociology, University of California at Riverside. *Id.*, vol. XII, at 2274; and Dr. Ernest van den Haag, Professor of Sociology and Psychology, New York University. *Id.* at 2216. Mercer and Dodson were called by the United States, Glatt and Liell by the intervening plaintiffs and Hooker and van den Haag testified for suburban schools.

[291]Witnesses in this group were Brenda Bowles, Director of Division of Equal Educational Opportunity, Indiana Department of Public Instruction. *Id.*, vol. I, at 19; Mr. Robert DeFrantz, Director, Communtiy Action against Poverty in Marion County and member of IPS Board 1968-1972. *Id.* at 147; Sam Jones, Executive Director, Indianapolis Urban League. *Id.*, vol. IV, at 699-700; Norman L. Morford, Deputy Director, Indiana Civil Rights Commission. *Id.*, vol. I, at 76; and Osma Spurlock, District Director, Equal Employment Opportunity Commission. *Id.*, vol. VI, at 1218.

[292]*Id.*, vol. XIV, at 2552-2613.

whites to the suburbs, and a birth rate which was significantly higher for blacks than for whites. Dr. Dodson testified that the migration to cities was about over and that the birth rate for both blacks and whites has been declining. Due to these changes, Dodson said, "We are in a completely different era, a different ballgame than three years ago."[293]

The only expert whose testimony had a demonstrable impact on Judge Dillin's holding was Dr. Charles A. Glatt.[294] At least some, perhaps all, of the defense attorneys believe that Judge Dillin accepted the testimony of Professor Glatt, and not the conflicting opinion of other experts, because the judge had his mind made up prior to the trial that on IPS-only plan would not be acceptable.[295]

Whether the issue truly was an open question or not, Professor Glatt's opinion prevailed over those of the other experts on the question of whether an IPS-only plan was acceptable. His opinion was that whenever a school or a school system exceeds 25 to 33 percent black students, the white flight will accelerate and the school or the system will resegregate to all or nearly all black students. For this reason, Dr. Glatt testified, IPS could not be effectively desegregated within its own boundaries.[296] He testified that white flight is a recognizable phenomenon in cities with or without a desegregation plan but that the process "speeds up evidently" in response to a desegregation plan.[297]

The defense cast doubt on Dr. Glatt's tipping point testimony by the fact, brought out on cross-examination, that as an IPS-retained consultant Glatt had once recommended parameters of 15 percent be established for IPS schools. Since IPS schools in 1973 had 40 percent black students, this would mean the schools, under Dr. Glatt's recommendation, could have from 25 to 55 percent black students. Judge Dillin apparently recognized that his earlier recommendation was made in the context of IPS only, where it would be impossible to bring the schools below the tipping point.

---

[293]Direct exam, Dr. Dodson, July 5, 1973. *Id.* at 2582.

[294]Testimony, Dr. Glatt, June 18, 1973. *Id.*, vol. IV, at 729-854.

[295]Confidential personal interview.

[296]Professor Glatt testified:

> [T]he general professional view is that when a district or a particular school attendance area becomes somewhere between 25 to 33 percent black, that's when the white residents begin to panic and that's when a certain amount of movement out begins to increase. My professional judgment is, if any school district alone is involved in the desegregation, it will become an invitation to become an all-black or nearly all-black school city.

Direct exam, June 18, 1973. Record, vol. IV, at 759.

[297]*Id.*

Judge Dillin's impression of Dr. Glatt as a witness was vividly demonstrated in August of 1973 when he was named one of the two court commissioners appointed to prepare an interim plan for the court.[298]

Dr. Hooker testified on behalf of the suburban schools that an IPS-only plan was preferable to a metropolitan plan. He favored an IPS-only plan because larger school systems encounter more complex problems and are less effective educationally. Dr. Hooker testified an IPS-only plan would be a satisfactory remedy because white flight is "grossly overstated."[299] IPS would not, according to him, resegregate because the black migration is essentially over and because of a decline in the birth rate. Judge Dillin stated in his opinion that "the testimony of . . . Dr. Hooker, was completely demolished by cross-examination showing that in his published articles he had expressed views opposite to those given in this case . . . ."[300] Counsel for intervenors did cross-examine Dr. Hooker extensively from some of his 1968 publications, but some defense attorneys critically charge[301] that the cross-examination Judge Dillin was referring to in this sentence was in fact conducted by Judge Dillin.[302]

Dr. Liell, an Indianapolis resident and a demographer, testified it was his opinion that an IPS-only plan would result in

---

[298]Order, Aug. 27, 1973, at 4.

[299]Direct exam, June 28, 1973. Record, vol. XI, at 2092.

[300]368 F. Supp. at 1199.

[301]Confidential personal interview.

[302]This charge is likely based on testimony in which Judge Dillin asked Dr. Hooker why, if white flight were a myth, the percentage of black students was increasing in IPS.

Dr. Hooker said, "It is generally a loss in birth rate. The white birth rate declined some seven years ago in Indianapolis. The black birth rate began to decline in this city in the last few years." Record, vol. XI, at 2134.

After the court asked for an explanation of the enrollment figures in the IPS high schools, the following exchange took place:

Witness Hooker:	There is a loss in white enrollment in the high schools in Indianapolis over the ten-year period.
The Court:	And that wouldn't be the birth rate, then, would it?
Witness Hooker:	No, it wouldn't.
The Court:	So where do you think they went—evaporated?
Witness Hooker:	No, sir.
The Court:	Where do you think they went?
Witness Hooker:	They may have gone to the suburbs, but I don't know if they did or not.
The Court:	Good guess!

Id. at 2134-35.

resegregation of IPS.[303] Dr. Liell's opinion was based on 1970 census data and demographic trends in Indianapolis.

Dr. Mercer testified that a desegragation plan would not encourage white flight.[304] She had done extensive work with the desegregation of schools in Riverside, California and was generally familiar with the desegregation activities in many California schools. Judge Dillin said that the Riverside experience contained factors irrelevant in Indianapolis. In Riverside minority students constituted less than 25 percent of the student population, the desegregation plan was voluntary, and implementation of the plan was accompanied by much community relation effort.[305]

Dr. van den Haag testified to the effect that integration does not reduce prejudice or promote racial harmony. Objections to his testimony were sustained and he was not permitted to testify.[306] The defendants also offered to present Dr. David J. Armor, who would have testified on the same issue. He was excluded.[307] The court of appeals upheld the exclusion of the evidence as an attempt to challenge the underpinnings of *Brown* I.[308]

D. The Decision

Judge Dillin held on July 20, 1973, that an IPS-only plan was not acceptable. He found that the tipping point factor applied to the IPS system as a whole and that "when the percentage of Negro pupils in a given school approaches 25% to 30%, more or less, in the area served by IPS, the white exodus from such a school district becomes accelerated and continues."[309] Judge Dillin stated that since on the whole IPS had more than 40 percent black students there were only two possible kinds of IPS-only plans. One would be to order all the schools desegregated with a racial composition of approximately 60 percent white and 40 percent black.[310] This is what the judge referred to in his earlier opinion as massive " 'fruit basket scrambling' "[311] which he said would not work because all of the schools in the system would be beyond the tipping point and the IPS system thus would resegregate by be-

---

[303]Dr. Liell's testimony for June 19 and 20, 1973, is recorded at record, vol. V, at 1013-15 and vol. VI, at 1076-1128.

[304]Dr. Mercer's testimony of July 2, 1973, is recorded at record, vol. XII, at 2274-2352.

[305]368 F. Supp. at 1198-99.

[306]503 F.2d at 83-84.

[307]*Id.*

[308]*Id.*

[309]368 F. Supp. at 1197.

[310]*Id.* at 1198.

[311]332 F. Supp. at 678.

coming all black in a short period of time.[312] The other alternative would be to desegregate less than all of the IPS schools so that the desegregated schools were below the tipping point, leaving other schools all or predominately black.[313] Judge Dillin held that neither of these was a constitutionally permissible remedy.[314]

Having found an IPS-only plan was not acceptable, Judge Dillin held there was legal basis for an interdistrict remedy.[315] This conclusion was based primarily on the proposition that Indiana school corporations are the responsibility of the State of Indiana. Due to the Indiana Constitution,[316] IPS was an agent of the state and the unlawful acts of segregation of IPS were imputed to the state. Judge Dillin also held that because of the state's broad powers over the educational process, the state has an affirmative duty to act to eliminate unlawful segregation;[317] he found the state had "done almost literally nothing, and certainly next to nothing, to furnish leadership, guidance, and direction in this critical area."[318] The fact that education was a state function in Indiana distinguished the case in Judge Dillin's mind from the *Bradley v. School Board of City of Richmond*[319] decision. Instead of *Richmond* the judge relied on *Bradley v. Milliken*.[320] He held the educational process in Indiana was more comparable with Michigan's than with Virginia's.[321]

Judge Dillin found specific acts of de jure segregation on the part of the state provided further basis for an interdistrict remedy. In the 1971 opinion, he had held the location of two new IPS high schools, John Marshall High School and Northwest High School, in the outer reaches of the IPS district, as far removed as possible from the black community, resulted in the schools' opening as almost all-white high schools, while other IPS high schools were still all black.[322] The approval of these site selections, pursuant to state law, by the Indiana Department of Public Instruction constituted acts of de jure segregation. These acts were the basis for an interdistrict remedy because "the State controls the instrumentalities whose action is necessary to remedy the harmful effects of the State acts."[323]

---

[312] 368 F. Supp. at 1198.
[313] *Id.*
[314] *Id.*
[315] *Id.* at 1205-06.
[316] IND. CONST. art. 8, § 1.
[317] 368 F. Supp. at 1199-1203.
[318] *Id.* at 1203.
[319] 462 F.2d 1058.
[320] 484 F.2d 215 (6th Cir. 1973), *rev'd*, 418 U.S. 717 (1974).
[321] 368 F. Supp. at 1205.
[322] 332 F. Supp. at 669.
[323] 368 F. Supp. at 1205.

In the judgment of the attorneys for the suburban schools the most significant finding was that the suburban schools had not committed any acts of de jure segregation.[324] Judge Dillin did find the suburban schools were culpable in that they had unanimously opposed an effort to reorganize the schools in Marion County. The failure to obtain reorganization "froze all existing school corporations in Marion County according to their then existing 1961 boundaries."[325] The judge said, "It is apparent that confining IPS to its existing territory had the effect, which continues, of making it first difficult and now impossible to comply with the law requiring meaningful desegregation."[326] The opinion does not place reliance on this factor as a basis for imposing an interdistrict remedy. There was no ruling on the constitutionality of Uni-Gov.[327]

Judge Dillin did not impose a remedy in this opinion but instead provided the Indiana General Assembly "a reasonable time" in which to devise and implement a remedy.[328] The opinion leaves no doubt as to the alternative to legislative action: "If the General Assembly fails to act in the manner described within a reasonable time, this Court has the power and the duty to devise its own plan, and to order the defendant[s] . . . to implement the same."[329]

---

[324]Judge Dillin said:

> There was no evidence that any of the added defendant school corporations have committed acts of *de jure* segregation directed against Negro students living within their respective borders. In fact, the evidence shows that, with a few exceptions, none of the added defendants have had the opportunity to commit such overt acts because the Negro population residing within the borders of such defendants ranges from slight to none . . . .

Id. at 1203.

[325]*Id.*

[326]*Id.* at 1204.

[327]In the only portion of the opinion which speaks to the intervening plaintiffs' prayer for a declaration that Uni-Gov is unconstitutional, Judge Dillin says:

> In the opinion of the Court such statutes, [the judge was referring to additional statutes] along with the application or the misapplication of the School Reorganization Act of 1959, certainly placed IPS in a straight jacket. However, in view of the Court's other findings and conclusions, it is unnecessary to consider the question of unconstitutionality.

Id. at 1208.

[328]No rational, politically aware person in the state of Indiana believed that the Indiana General Assembly would relieve Judge Dillin of this political hot potato, but Judge Dillin acquired some public support by giving the General Assembly one last chance to act. *Id.* at 1205.

[329]*Id.*

V. Interim Relief

A. The Orders

While awaiting the response of the General Assembly, Judge Dillin ordered what he called interim measures to be implemented prior to the beginning of the 1973-74 school year. He ordered black students transferred from IPS to each of the defendant suburban schools, both in Marion County and outside Marion County, in such numbers to equal 5 percent of the enrollment of each suburban school corporation.[330] The order excluded kindergarten students and high school seniors. In addition, Washington and Pike Townships, which already has measurable numbers of black students would receive fewer IPS transfers.[331]

The court ordered IPS internal desegregation efforts increased so that when school opened in the fall of 1973 each IPS elementary school would have a minimum black enrollment of 15 percent.[332] This was to be done by first pairing and clustering schools which were in close proximity. If, after utilizing these procedures the required 15 percent level was not reached, pairing and clustering of schools in "non-contiguous zones" was ordered.[333]

Judge Dillin ordered high school feeder patterns altered so that Howe High School, which had a black enrollment of about 6 percent, would have a black enrollment of about 25 percent, and Shortridge High School, which was predominantly black, would have a black student enrollment not more than 60 percent.[334] In adjusting these assignments, Judge Dillin reminded IPS that Arlington High School and Broad Ripple High School had then already passed the 40 percent black tipping point and black enrollments at these schools should be reduced if possible. No specific action was ordered with respect to these two high schools.[335]

Judge Dillin said that if transportation of pupils was required to effectuate the interim plan the transportation of students of the two races should be "generally proportionate."[336] Recognizing, however, that the burden of busing would not be proportionate,

---

[330] *Id.* at 1209. This order is further evidence that the entire controversy might have been resolved in 1971 when IPS proposed to transfer 5 percent black students to each of the township schools.

[331] Washington Township, which had 11 percent black students in 1973, was ordered to receive black students from IPS equal to 1 percent of Washington's enrollment. Pike Township had 8 percent black students and was ordered to receive an additional 2 percent. 368 F. Supp. at 1209.

[332] *Id.*

[333] *Id.*

[334] *Id.* at 1209-10.

[335] *Id.* at 1210.

[336] *Id.* at 1209.

he qualified this requirement by stating that nothing in the order would prevent "IPS from closing obsolete, heavily black schools if no longer needed . . . [and that] in some cases, a disproportionate number of black students will require transportation."[337] All defendants were ordered to institute "appropriate in-service training courses for their respective faculties and staff, and otherwise to orient their thinking and those of their pupils toward alleviating the problems of segregation."[338]

B. The Response from Community Leaders

The public response to Judge Dillin's opinion was immediate and uniform in its opposition. Those people in Indianapolis who supported Judge Dillin kept their sentiments to themselves. The public response on this occasion was typical of the general public reaction to the judge's actions throughout the case.

The leaders of the black community were initially united in their disapproval of Judge Dillin's opinion, because of the decision to bus black students to the suburban schools without a reciprocal return of white students to the city schools. The Rev. Boniface Hardin, Director of Martin Center, a black culture organization said, "I think it is naive to think black parents will send their children out there. I'm very much afraid these children will be harmed, given the behavior pattern manifested at this time."[339] David Mitcham, president of the Indianapolis Chapter of the NAACP, denounced Judge Dillin's decision. Mitcham was quoted by the *Indianapolis News* as saying, "It shows us we haven't come a darn bit since the 1954 'separate-but-equal decision.' "[340] On July 31, 1973, however, Mitcham announced that the local Board of Directors of the NAACP had voted to support Judge Dillin's decision, and Mitcham said he supported the decision.[341]

The response from the white citizens in the suburbs was just as immediate and just as negative. The day after the opinion, Dan L. Burton announced that he was reactivating the organization called Citizens Against Busing and the group would begin circulating petitions.[342] The campaign to impeach Judge Dillin was intensified and a new paragraph was added to the petition. On August 25, 1973, Burton together with Marion County Circuit Court Judge John L. Niblack and two members of the Indiana General Assembly announced at a press conference that they were

---

[337] *Id.*

[338] *Id.* at 1210.

[339] News, July 20, 1973, at 2, col. 3.

[340] *Id.*

[341] Star, Aug. 1, 1973, at 9, col. 3.

[342] News, July 23, 1973, at 24, col. 3.

beginning a drive to obtain signatures on petitions asking the Congress to impeach Judge Dillin for " 'unconstitutional, unlawful and dictatorial actions.' "[343] It was announced that Burton, Niblack, Rep. Robert Bales from Danville, Indiana, and State Senator Joan Gubbins, Indianapolis, all Republicans, were forming a new organization to be incorporated, called Committee To Impeach Judge Dillin. The *Indianapolis News* reported that three members of the IPS school board attended the news conference.[344]

Niblack, who had been Marion County Circuit Court Judge for over thirty years, said Dillin had " 'seized the reins of civil authority and deposed a duly elected and qualified school board of this state as effectively as Castro took power in Cuba, or Russia in Czechoslovakia without anymore legal warrant.' "[345] Niblack said that Dillin " 'has acted as chief advocate, judge, jury and executioner in the case, ordering new parties added to the case on his own motion . . . putting them to large expense of taxpayers' money to defend themselves.' "[346] The *Indianapolis News* reported that Niblack was asked at the news conference why he did not also call for the impeachment of the United States Court of Appeals for the Seventh Circuit, which had up to that time upheld all of Judge Dillin's decisions in the case. The article reported that Niblack responded, " '[b]ecause I didn't choose to. I'll say this about the 7th Circuit Court. I think it's a rotten court. They let the Chicago 7 and Kunstler go. Maybe they should be impeached.' "[347] Niblack added that he was concerned with the " 'oligarchy of Federal judges who have seized power in the U.S. without regard to the law.' "[348]

When a question was asked at the news conference whether Niblack was violating any canons of professional ethics by speaking out against another judge, Burton responded that "the answer would be up to the electorate to determine whether Niblack was right in speaking out in that Niblack's present six year term would expire on January 1, 1975."[349]

---

[343]News, Aug. 25, 1973, at 1, col. 1.

[344]*Id.* The article reported that board members Paul Lewis, Lester Neal, and Fred Ratcliff attended the news conference.

[345]*Id.* Niblack was referring to the appointment of two court commissioners to prepare an interim desegregation plan. See text accompanying note 366 *infra.*

[346]*Id.*

[347]*Id.*

[348]*Id.*

[349]Star, Aug. 25, 1973, at 3, col. 4. Niblack was not reelected to the Marion County Circuit Court in 1974, but it is not believed the movement to impeach Judge Dillin had any significant impact on the election. At the 1974 election all of the incumbant state court judges in Marion County,

Two days after the press conference, Representative Bales was quoted as saying that Judge Dillin was, through his school desegregation orders, seeking to "establish legal credentials for a possible appointment to the United States Supreme Court."[350]

In what was to be the theme of the impeachment campaign, Niblack charged Dillin had "deliberately violated the 1964 Civil Rights Act passed by Congress which forbids discrimination against citizens and school children by race or color and which specifically forbids assigning school children or drawing of school districts to correct racial imbalance."[351]

The proposition asserted by Judge Niblack had been fully considered by the United States Supreme Court in *Swann v. Charlotte-Mecklenburg Board of Education.*[352] Judge Niblack was either unaware of or unwilling to accept the Supreme Court's interpretation of the statutory language. In *Swann*, the Supreme Court very unambiguously said this language was designed to "foreclose any interpretation of the Act as expanding the *existing* powers of federal Courts to enforce the Equal Protection Clause."[353] The Court also said there was "no suggestion of an intention to restrict those powers or withdraw from courts their historic equitable remedial powers."[354]

C. The Stay

On August 8, 1973, Judge Dillin stayed those portions of the decision which required transportation of students outside IPS

---

all Republicans, were defeated and the entire slate of Democratic candidates were elected.

[350]Star, Aug. 27, 1973, at 1, col. 1.

[351]*Id.* Judge Niblack was referring to Title IV of the Civil Rights Act of 1964.

> "Desegregation" means the assignment of students to public schools and within such schools without regard to their race, color religion, sex or national origin, but "desegregation" shall not mean the assignment of students to public schools in order to overcome racial imbalance.
>
> . . . .
>
> [N]othing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards.

42 U.S.C. § 2000c-6 (1970).

[352]402 U.S. 1 (1971).

[353]*Id.* at 17.

[354]*Id.*

for the 1973-74 school year.[355] He ordered IPS to file an interim plan for the upcoming year.[356] IPS was ordered to submit a plan in which no elementary school would have less than 15 percent black enrollment, which would reduce Shortridge High School to 60 percent black, and which would make Thomas C. Howe High School about 25 percent black, instead of the predicted 6 percent black.[359]

On August 14, 1973, the IPS Board submitted a plan to the court which did not satisfy any of these criteria. The IPS plan left 15 elementary schools with less than 15 percent black enrollment[360] and did not satisfy the standard established for the 2 high schools.[361] Judge Dillin held a hearing on August 20, 1973, to hear evidence on the IPS plan. After hearing testimony for several hours, Judge Dillin ruled from the bench that the plan was not in compliance with the order of July 20, 1973.[362]

Judge Dillin said the IPS plan was rejected not only because none of the three requirements had been satisfied, but also because

> [m]ost importantly, the plan is in complete disregard of the Court's order of July 20, 1973 as to method of desegregating the elementary schools. That order, agreeable to the policy of the Supreme Court of the United States as enunciated in *Swann v. Charlotte-Mecklenburg Board of Education*, required the Board to give first consideration to the changing of attendance zones, and to such devices as pairing and clustering before giving consideration to transportation of pupils. The Board's plan does not provide for the use of any of these Supreme Court approved devices.[363]

To emphasize this point, the judge pointed out one instance in which an IPS elementary school was 40 percent black and a contiguous school was less than 5 percent black.[364] Instead of pairing the two, as the July 20, 1973, order required, the plan proposed by IPS left these two schools as they were.[365]

---

[355]368 F. Supp. at 1224.
[356]*Id.* at 1208.
[357]*Id.* at 1209.
[358]*Id.* at 1210.
[359]*Id.*
[360]Direct exam, Joseph C. Payne, Aug. 20, 1973. Record at 51.
[361]Opening statement, Mr. McTurnan, Aug. 20, 1973. Record at 5.
[362]A written order was released on August 27, 1973.
[363]Order, August 27, 1973 at 2.
[364]Aug. 20, 1973. Record at 122. (Schools 104 & 65).
[365]*Id.* Judge Dillin's sentiments on the entire case were as follows: [N]ever, since this thing started on the complaint of the United States in 1968 . . . has any [IPS] Board . . . gone very far to do

D. The Appointment of Commissioners

Having found IPS in default of the July 20, 1973, order, Judge Dillin appointed two court commissioners[366] to formulate both an interim plan for the 1973-74 school year and a final plan. The commissioners appointed were Dr. Joseph T. Taylor and Dr. Charles A. Glatt.[367] IPS was directed to cooperate fully with the commissioners, to provide them space at the Education Center (the IPS Administration Building) to pay all their fees and expenses, and to provide office support. The commissioners were to have full access to the maps, drawings, reports, statistics, computer studies and all information about the school system which they needed in their preparation of a plan. Judge Dillin specifically ordered that

> until such time as the Commissioners may have completed their assigned tasks to the satisfaction of the Court, the defendants are ordered and directed to assign their professional planning staff wholly to the services of the Commissioners, except as Commissioners or the Court may otherwise permit or direct.[368]

Finally, Judge Dillin ordered IPS to formally apply to the United States Department of Health, Education and Welfare for funding, under Title VII of the Civil Rights Act of 1964, for a comprehensive human relations program.[369] The judge said, "little bitty school systems that I never heard of . . . are collecting, in some instances, over a million dollars a year for this type of thing."[370] No action of Judge Dillin has created more animosity with the IPS Board than the order to apply for federal funds. At a special board meeting on August 21, 1973, the IPS Board voted to apply for the federal funds as ordered by the court. Four of the

---

> anything, really, unless they were pushed and ordered. And then when they were ordered, they usually . . . come up with an alternate idea that doesn't go quite as far as the order, or you want a stay or something — any thing to put it off.

Record at 117 (Aug. 20, 1973).

[366]Order, August 27, 1973, at 4. The appointment of two court commissioners was proposed in a motion to the court by the intervening plaintiffs Buckley on August 15, 1973. Record at 109.

[367]Dr. Taylor was the Dean of the School of Liberal Arts, Indiana University, Purdue University at Indianapolis. Dr. Glatt was Professor of Education and Director of a desegregation center at Ohio State University. Dr. Glatt had done consulting work for IPS and was a witness at the 1973 remedy trial. See, *e.g.*, Aug. 20, 1973, Record at 129-30.

[368]Order, August 27, 1973 at 4-5.

[369]*Id.* at 6.

[370]Aug. 20, 1973. Record at 126. Judge Dillin was berating IPS for complaining of the cost to desegregate while not applying for federal funds to provide for the cost.

members of the board read a public statement which said that they were voting to apply for the funds only because of the court order and that they still disapproved of accepting federal funds.[371] The board members felt so strongly about this issue they literally took it all the way to the Supreme Court. After the order to apply for the funds was affirmed by the court of appeals,[372] IPS unsuccessfully sought a writ of certiorari from the United States Supreme Court.[373] The initial IPS application for the Title VII funds was not a sincere effort by IPS and funding was denied. Judge Dillin declined to hold the defendants in contempt because of the defective application. Instead he ordered IPS to reapply for the federal funds and the funds were ultimately received.

In what a court of appeals opinion later described a "herculean task within a miniscule period of time,"[374] the commissioners were asked to formulate a desegregation plan which would be implemented when school started 15 days later. When the commissioners were appointed, there were 44 elementary schools in IPS which were at least 90 percent black. Although they were not strictly bound to do so, the commissioners used the guidelines which Judge Dillin imposed on the IPS Board in the July 20th decision.[375] The commissioners resolved that the interim plan should be one which could be expanded into a final plan without further reassigning those children affected by the interim plan. The commissioners made the assumption or the decision that in the final plan the black children attending the schools in the innermost core of the city would be transported to suburban schools. The interim plan paired and clustered the peripheral black schools with white in outlying areas of IPS. Under the interim plan 19 all-black schools remained in the center core of the city.

Despite the fact the IPS Board had vigorously resisted the court's desegregation efforts and had, in Judge Dillin's judgment, not done anything until they were forced to, the IPS staff had done considerable planning. Without this planning the commissioners would not have been able to prepare a plan in the small amount of time available. Following some initial difficulties (such as the commissioners not being provided a telephone because the court had not ordered that they be given a telephone), the commissioners established a bearable working relationship with

---

[371]Star, Aug. 22, 1973, at 52, col. 3. Board members Lester Neal, Carl J. Meyer, Constance Valdez, and Paul E. Lewis said they voted yes "only because of the Court order since they disapprove of accepting federal funds."

[372]503 F.2d at 78.

[373]Bowen v. United States, 421 U.S. 929 (1975).

[374]503 F.2d at 77.

[375]368 F.Supp. at 1206-08.

the IPS staff. The commissioners found that the staff personnel "had more faith in the law prevailing than did the board members."[376]

The IPS Board was consistently hostile to the commissioners, seemingly holding the commissioners personally responsible for their intrusion. During the time the commissioners were preparing a plan, the IPS Board met frequently, perhaps daily, to quiz staff members about the commissioners' activities.[377] The only meeting of the commissioners and the IPS Board took place when the commissioners presented the interim plan to the board the night before presenting it to Judge Dillin. At the meeting, the members of the IPS Board demonstrated very strong, emotional, personal resentment of the commissioners.[378]

When the commissioners' plan was presented to Judge Dillin on August 30, 1973, the defendants asked that the kindergarten and high school pupils be excluded from the plan. IPS wanted kindergarten students excluded so as not to require busing of the youngest children. They wanted to exclude the high schools from the interim plan because they believed the potential for violence and disorder increased as the age of the students increased. The commissioners accepted these alterations and they were approved by Judge Dillin. The plan, as approved by Judge Dillin, called for the reassignment of 9,300 students, 80 percent of whom would be bused.

IPS Board members, apparently in reliance on their continuing efforts to obtain a stay, had not made any arrangements to obtain buses. They pleaded with Judge Dillin that they could not possibly institute the plan when school opened on September 4 because they did not have the transportation facilities. Judge Dillin permitted school to open as planned but ordered that all reassignments of the interim plan be effectuated within about six weeks. The first reassignments were made on September 17, 1973.

The delay of the reassignments until after school opened resulted in some advantages as well as the obvious disadvantages. The biggest disadvantage was that students started school in one building and were then within 6 weeks assigned to another class in another building. This created a great deal of uncertainty and anxiety for the parents and resulted in a great deal of unnecessary turmoil. On the other hand, IPS administrators be-

---

[376]Confidential personal interview.

[377]The commissioners believed some of the IPS board members were leaking this information to the press. *Id.*

[378]*Id.*

lieve the interim plan was efficiently and effectively conducted because they were given an opportunity to implement the plan in phases.[379]

The 9,300 student reassignments were divided into 8 phases for the initial transfer. All 8 phases were implemented in the first 6 weeks of school. As part of the implementatiin of the interim plan, IPS made a last-minute effort to prepare school personnel and parents for the reassignments. An administrator from central administration was individually assigned to each school to assist in the transfers. Switchboard operators at the education center were advised of these assignments and incoming calls were referred accordingly. Each newly assigned student was assigned a buddy at his new assigned school, and IPS attempted to send a personalized letter to each parent involved. In at least one white school,[380] the principal and the parents worked very hard to make the incoming black students feel wanted. Some public demonstrations were conducted, never more than 300 people reportedly participating,[381] and there were some rumors of school boycotts, but neither action had any significant effect. Within a few days after all transfers had been completed, enrollments were reported to be normal and the public outcry had dissolved.[382]

IPS, even while implementing the interim plan, continued its efforts to obtain a stay. On September 15, 1973, the board received word that Justice Rehnquist had denied its motion.[383] Justice Rehnquist dangled some bait for IPS, however, saying the stay was denied because Judge Dillin had not had full opportunity to rule on the issues raised by IPS.[384] On October 9, during implementation of the interim plan, IPS again petitioned Judge Dillin for a stay. The motion was denied and IPS again petitioned Justice Rehnquist for a stay. This petition was denied.

VI. Aftermath of the Interdistrict Remedy Order

A. The Response of the Indiana General Assembly

The Indiana General Assembly met in November of 1973 to organize itself for a session which would convene in January of 1974. The early indications from the public statements of the Governor and the legislative leaders were that the General As-

---

[379] *Id.*

[380] IPS School 84.

[381] *See e.g.*, News, Sept. 13, 1973, at 24, col. 4; News, Sept. 14, 1973, at 4, col. 3.

[382] News, Sept. 18, 1973, at 2, col. 1.

[383] Star, Sept. 15, 1973, at 1, col. 1.

[384] *Id.*

sembly would not accept Judge Dillin's invitation to devise a desegregation plan for metropolitan Indianapolis.[385] The most commonly stated reason was that the problem was of local and not state concern. The issue was simply too hot to handle politically and the Republican-controlled General Assembly was not anxious to extricate Judge Dillin from the case. In an effort to encourage the General Assembly to act, Judge Dillin issued, on December 6, 1973, a supplemental memorandum of decision.[386] In this opinion Judge Dillin elaborated on the reasoning for his decision that the General Assembly had a duty to provide a metropolitan plan.[387] He also specified the length of time he was willing to wait for the state to act[388] and provided the General Assembly guidelines for a plan.[389]

Judge Dillin also vacated the orders contained in the July 20, 1973, opinion which required transfer of students to the suburban schools on an interim basis.[390] This order had previously been stayed. Judge Dillin said he did not want the orders to be an impediment to legislative action.[391]

Judge Dillin's opinion that the General Assembly had a duty to devise a plan to dismantle the dual school system in IPS[392] was based on the constitutional oath taken by members of the General Assembly,[393] the principles of *Brown* I and *Brown* II, and the supremacy clause of the United States Constitution.[394]

As possible alternatives Judge Dillin suggested the General Assembly could combine all the school districts in the metropolitan Indianapolis area into a single metropolitan school district; it could replace the present 24 school districts with 6 or 8 new school districts; or it could provide for an exchange of pupils within the existing school corporations.[395] Judge Dillin advised the General Assembly that one-way busing of black students to the suburban schools would not be acceptable unless there were "compelling reasons" to support such an approach. He suggested a compelling reason might be the closing of some of the old unsatisfactory school buildings in the Indianapolis inner city.[396] The

[385] *See e.g.*, News, Dec. 8, 1973, at 21, col. 5.
[386] 368 F. Supp. at 1223.
[387] *Id.* at 1224-27.
[388] *Id.* at 1224.
[389] *Id.* at 1227-28.
[390] *Id.* at 1231.
[391] *Id.*
[392] *Id.* at 1224-25.
[393] U.S. CONST. art. VI, § 3.
[394] U.S. CONST. art. VI, § 2.
[395] 368 F. Supp. at 1227-28.
[396] *Id.*

opinion stated that "the Court considers a reasonable time within which the General Assembly should act to be the end of its January, 1974 session or February 15, 1974, whichever date is sooner."[397]

The Indiana General Assembly did not accept the directive. Not only was no metropolitan plan forthcoming from the General Assembly, none was introduced and there was very little public discussion of the issue during the session. The only legislation enacted which was applicable to the case was Senate Enrolled Act 119, a statute which "provides for the adjustment of tuition among transferor and transferee schools and for the reimbursement of transportation costs by the state and is rigidly limited in its application . . . ."[398]

On the same day the supplemental opinion was announced, December 6, 1973, Judge Dillin relieved the commissioners of the task of preparing a final plan for the desegregation of IPS.[399] The IPS planning staff was released to the complete control of the board and the IPS board was ordered to prepare a plan for the desegregation of IPS on an interdistrict basis. This plan was to be available as a contingency plan in the event the General Assembly failed to act. Judge Dillin subsequently ordered IPS to pay Dr. Glatt $29,925 and Dr. Taylor $13,950 for their services as commissioners.[400]

In January of 1974 the IPS staff prepared a proposed metropolitan plan as ordered by the court.[401] On February 12, 1974, the IPS Board voted five to two not to approve the plan but to permit the plan to be submitted to the court in accordance with the court's order.[402] The plan proposed the closing of most of the remaining all-black IPS schools and the closing of some biracial schools in stable integrated neighborhoods. Some of these schools were relatively new and others had been extensively remodeled in recent years.

On March 21, 1974, the appellate courts had still not approved an interdistrict remedy so Judge Dillin ordered IPS to

---

[397]*Id.* at 1224.

[398]*See* 503 F.2d at 74.

[399]Entry, Dec. 6, 1973. Record at 1.

[400]In addition to the compensation for the commissioners IPS was required to pay $5,000 in attorneys' fees for John O. Moss and John Preston Ward for legal services the two attorneys performed for the commissioners in defending an action brought against the commissioners in an Indiana state court.

[401]Phase II—Metro Plan (Indianapolis III). Submitted to the Board of School Commissioners, February 12, 1974.

[402]Confidential personal interview.

submit three IPS-only contingency plans. IPS responded by filing the Area Pyramid Plan with two minor variations thereof as the three plans.[403] IPS also prepared and submitted to the court a fourth plan which was advertised by IPS Board members as being based on plans proposed in Memphis and Knoxville. This latter IPS plan would have left a number of IPS elementary schools predominantly black and contemplated much less integration than Judge Dillin had consistently indicated would be required.

When the appeals from the Indianapolis case and the Detroit case had not yet been resolved in July of 1974, Judge Dillin entered an order staying the interdistrict transfers for the 1974-75 school year. The interim plan was ordered continued for another year with only minor adjustments.

B. Two Proposed Interventions

Since Judge Dillin's ordering of an interdistrict remedy relied on *Milliken*, it was inevitable that the Indianapolis case would continue to track this Detroit case. The Seventh Circuit heard oral arguments on appeals in the Indianapolis case on February 20, 1974;[404] one week later the United States Supreme Court heard oral arguments in the Detroit case.[405]

Most interested people in Indianapolis believed the Seventh Circuit would not decide the appeals from Judge Dillin's 1973 decision until the Supreme Court had ruled on the Detroit case. From the end of February 1974 through the spring of 1974 it was generally believed that decisions in the two cases would be forthcoming at any time and that the final desegregation plan would be put into effect in the fall of 1974. In anticipation of the appellate decision in the two pending cases and the expected final plan, two groups petitioned to intervene as parties to the case so they might have a voice in the formulation of the final plan.

On April 19, 1974, the Indiana State Teachers Association (ISTA) moved to intervene as a plaintiff.[406] At the time ISTA sought to intervene, IPS was withholding contracts for the 1974-75 school year from all probationary teachers pending a resolution by the court of appeals of the interdistrict remedy issue. IPS stated

---

[403]Plans for desegregation of Indianapolis Public Schools; submitted to the Board of School Commissioners, Indianapolis Public Schools, April 30, 1974.

[404]503 F.2d at 68.

[405]418 U.S. at 717.

[406]Petition of ISTA for Further Relief, IP 68-C-225, April 19, 1974.

that it would need as many as 1,000 fewer teachers[407] if a desegregation plan involving a one-way transfer of students out of IPS was implemented. ISTA alleged in its petition to intervene that it was an affiliate of the National Education Association with local affiliates throughout the state of Indiana. One local affiliates is the Indianapolis Education Association, whose membership consists of more than 1,800 teachers employed by IPS.[408]

The petition raised several objections to the metropolitan plan submitted to the court by IPS on March 8, 1974. ISTA complained that the plan was obviously incomplete in that it was

> limited to demographic factors and contains nothing pertaining to the impact of desegregation, such as curriculum development, guidance and other programs for minority children making the transition, assistance to teachers and other school personnel in dealing with issues incident to desegregation.[409]

The petition also alleged the plan was

> further deficient in that it contains no data whatever concerning teacher displacement, and no indiciation whether or not displaced teachers, if any, could or would be absorbed elsewhere in the desegregation area, either in Indianapolis or the suburban schools.[410]

IPS was faced with a dilemma. The deadline, in the spring of 1974, for either rehiring or dismissing non-tenured teachers appeared likely to pass before the court of appeals ruled on the propriety of a metropolitan desegregation plan. Since the decision of the court of appeals could affect the total IPS enrollment by about 10,000 students, IPS did not know how many teachers it would need in the fall of 1974. The approach it chose for resolving this dilemma was to dismiss all non-tenured teachers and later rehire as many as were needed.

ISTA alleged that this approach, "wholesale dismissal to be followed by selective re-hiring pursuant to new applications,"[411] was not in accord with the procedure for staff reduction required

---

[407]IPS announced on April 10, 1974, that the contracts of all probationary teachers would not be renewed. IPS further announced that those probationary teachers who wished to be considered for reemployment could apply after May 1, 1974. News, Apr. 11, 1974, at 1, col. 3.

[408]ISTA petition, *supra* note 406, at 1.

[409]*Id.* at 2.

[410]*Id.*

[411]*Id.* at 3.

in desegregation cases such as *Singleton v. Jackson Municipal Separate School District.*[412] ISTA also contended the approach taken by IPS was contrary to the provision in Judge Dillin's opinion of July 20, 1973, that

> [i]f any teachers presently employed by IPS are rendered surplus as a result of this order, and additional teachers are needed by any added defendant as a result hereof, first consideration shall be given by such added defendant to employing a qualified IPS teacher.[413]

ISTA prayed for an opportunity to participate in the formulaiton of a comprehensive plan covering all aspects of desegregation impact. ISTA asked that IPS be ordered to prepare such a comprehensive plan, and that the court "[e]njoin defendant Board of School Commissioners of the City of Indianapolis to reinstate all teachers who have been notified of non-renewal of contract for the 1974-75 school year . . . pending the approval by this Court of a comprehensive Desegregation Impact Plan . . . ."[414] Finally ISTA requested the court to require all school corporation defendants to

> offer contracts for the 1974-75 school year to all teachers on the same terms and conditions as such contracts would have been offered if no desegregation order had been pending, subject, however, to the right of the school corporation to terminate or change such contracts pursuant to a comprehensive Desegregation Impact Plan approved by this Court.[415]

After an extended period of uncertainty all IPS probationary teachers were hired for the 1974-75 school year. The ISTA petition to intervene was not granted during this critical period of time. The ISTA petition was not ruled on by Judge Dillin for almost a year. On the first day of the second remedy trial, March 17, 1975, the judge denied the ISTA petition in an oral ruling from the bench.[416] ISTA was subsequently granted leave to intervene by Judge William E. Steckler on August 8, 1975. Judge Steckler, the Chief Judge of the Southern District of Indiana, ruled on the renewed ISTA petition to intervene in the absence of Judge Dillin, who was on vacation.

---

[412] 419 F.2d 1211 (5th Cir. 1969).

[413] 368 F. Supp. at 1209.

[414] ISTA petition, *supra* note 406, at 5.

[415] *Id.* at 5-6.

[416] March 18, 1975, record, vol. I at 2. Judge Dillin did, however, state that there may be reason to intervene in the future.

The Community Coalition for Schools, a group organized by northside Indianapolis neighborhood associations, sought to intervene through a motion to intervene filed by this writer as counsel for the group on June 10, 1974.[417] The neighborhood associations coalesced around the fact that the metropolitan plan filed by IPS contemplated closing all schools on the northside of Indianapolis as far north as 49th Street. The metropolitan plan proposed to close 19 predominantly black schools and several integrated schools all in the north central part of Indianapolis. The proposed intervenors sought to protect educational, environmental, social, recreational, and financial interests of the residents which would be directly affected by the final desegregation plan.

The coalition, which consisted of representatives from each of the neighborhood associations, representatives from other organizations, and interested individuals, promulgated guidelines which it asked the court to follow in considering approval of any final desegregation plan. Since the rallying point of the coalition was the potential school closings, the principal thrust of the intervention was to pray that any plan should provide for retaining schools wherever the physical facilities were adequate for an ongoing education program. If it were necessary to close schools, it was submitted that schools should be closed because of deficient physical facilities.

The coalition opposed one-way busing, an issue very directly related to the closing of schools. As long as a substantial number of IPS students were to be transported to other school corporations, and none returned to IPS, it was inevitable that some IPS schools would be closed. The motion prayed that

> [t]he plan should assure that both the benefits and burdens of desegregation are shared by all children and parents and all neighborhoods affected by the plan in a manner which is fair and equitable and which does not arbitrarily impose the burdens of transportation and adjustment to new school environments solely upon particular neigh-

---

[417]The neighborhood associations responsible for the creation of the coalition were the Butler Tarkington Neighborhood Association, Inc., United Northwest Area, Inc., Meridian Kessler Neighborhood Association, Inc., Forest Manor Neighborhood Association, Mapleton Fall Creek Neighborhood Association, Inc. Ultimately other organizations and individuals became active in the coalition. The motion to intervene was filed in the name of four of the neighborhood associations (Meridian Kessler joined in the motion one week later, Motion to Join Motion to Intervene), and nine individual parents, acting individually and on behalf of their nine children who attended IPS schools. Motion to Intervene, June 10, 1974, IP 68-C-225.

> borhoods within the total planned area or upon a particular racial or social-economic group.[418]

The proposed intervenors prayed that the court, in evaluating a desegregation plan, should be concerned with the total educational program of the affected students. The coalition asked that students

> reassigned to new schools outside their neighborhood are provided an educational environment and programs in their new schools which are equal or superior to the educational environment and programs in the schools which they previously attended, with respect to class size, curriculum, teacher and staff qualification and experience, teacher aides and other auxiliary personnel, school facilities, books and other teaching materials and supplies, extra curricular programs and activities and all other aspects of a complete educational program.[419]

The coalition submitted that the plan should require all affected schools to make provisions for human relations programs and other teacher and staff training designed to "assure a receptive and friendly environment for transfer of pupils in their new schools . . . ."[420] This action had previously been ordered by Judge Dillin, but the extent of compliance was unknown.

The coalition urged that the final desegregation plan should to the greatest extent possible continue student reassignments of the 1973-74 interim desegregation plan.[421] It was suggested that those students who had once been reassigned should not again be disturbed unless it was absolutely necessary. The IPS-proposed metropolitan plan completely ignored the interim plan and would have resulted in a second reassignment for most of the students included in the interim plan.[422]

The coalition proposed that whenever possible the reassignments of children of a specific neighborhood be treated equitably.

---

[418]Intervening Plaintiffs' Claim for Intervention, June 10, 1974, at 2.

[419]*Id.* at 2-3.

[420]*Id.* at 3.

[421]*Id.*

[422]One of the individual intervenors was a white mother who had very vocally opposed having her daughter bused to a previously all-black school under the interim plan. This same mother was now very strongly opposed to having her daughter reassigned again. In less than one year the family had developed a strong identification with the new school and were just as upset about having their daughter transferred out of this school as they were about having her transferred out of her neighborhood school in the fall of 1973.

The interim plan, and other plans proposed by IPS, paired and clustered schools by assigning a portion of each school's district to a different school. The coalition of neighborhood associations objected to this practice on the grounds that it did not fairly and equitably spread the burdens of school desegregation. It was believed the method would unevenly affect property values. The members of the neighborhood associations were convinced that under this approach the value of residential property in that portion of the district assigned to the neighborhood school would be significantly higher than comparable property in that portion of the district assigned to a paired or clustered school in another part of the county.

As an alternative the coalition submitted that when schools were paired or clustered, the grades should be split among the schools so that all students would be bused out of their neighborhoods during some elementary years, but no child would be bused out all the time.[423]

The coalition contended the final plan should not permanently reassign children on the basis of race so that all of the black students in a neighborhood would go to one school while all the white students would go to another. The neighborhood associations asked the court to appoint an advisory committee "representing all racial, economic, and geographic interests of the City of Indianapolis to study all proposed plans and advise the court before adoption of the final plan . . . ."[424] They also asked the court to name, at the time the final plan was ordered, a "Biracial Committee to assist the court in monitoring the operation of the plan."[425]

None of the parties to the desegregation case opposed the motion to intervene on its merits. At the December 2, 1974, pretrial conference, IPS attorneys orally opposed the motion on the grounds that it was premature in that the court was not yet ready to consider a final plan. The motion was not ruled upon until March 17, 1975, the first day of the second remedy trial when

---

[423]For example, under the coalition suggested approach, if School 1 was to be paired with School 2, all students in grades 1-4 would go to School 1 and all those in grades 5-8 would go to School 2. The usual IPS method is that both Schools 1 and 2 would remain 1-8 schools. IPS would permanently assign all students from a designated geographic portion of the School 1 district to go to School 2 in exchange for all students from a certain designated geographic portion of the School 2 district, who would be permanently assigned to School 1. IPS objects to the coalition approach because it can result in children in the same family attending different schools.

[424]Intervening Plaintiff's Claim for Intervention, *supra* note 418, at 5.

[425]*Id.* at 6.

Judge Dillin orally denied the motion from the bench. The coalition has continued its efforts to intervene but has not as yet been successful.

C. *The 1974 Appellate Court Decisions*

The Supreme Court announced its decision in the Detroit case, *Milliken v. Bradley*,[426] on July 25, 1974. The Supreme Court's decision was followed a month later by the decision of the Seventh Circuit on the appeals taken from Judge Dillin's 1973 opinion.[427] The decision of the court of appeals did not completely resolve the multidistrict remedy issues involved in the desegregation of IPS schools. The Seventh Circuit held, on the basis of *Milliken*, that the school corporations outside Marion County could not be included in the desegregation. The court said:

> In the present case based upon the district court's comprehensive and detailed recital of the history of Indiana law and procedure pertaining to Indiana schools, . . . we conclude, as the district court did, that the state officials have, by various acts and omissions, promoted segregation and inhibited desegregation within IPS, so that the state, as the agency ultimately charged under Indiana law with the operation of the public schools, has an affirmative duty to assist the IPS Board in desegregating IPS within its boundaries . . . .
>
> On the other hand, the district court's findings, rulings, orders and discussion relating to a metropolitan remedy beyond the Uni-Gov boundaries are reversed. Those relating to a metropolitan remedy within Uni-Gov are vacated and remanded . . . .[428]

The court of appeals ordered dismissal of the case against the school corporations located outside Marion County, and remanded the case to Judge Dillin for "further proceedings" to determine whether an interdistrict remedy could be ordered against the school corporations inside Marion County. This conclusion was necessary because Judge Dillin had reversed his ruling on the issue of whether Uni-Gov could be the basis for an interdistrict remedy extending to the Marion County line. In vacating the court's opinion, the Seventh Circuit said "[t]he district court should determine whether the establishment of the Uni-Gov boun-

---

[426] 418 U.S. 717 (1974).

[427] 503 F.2d at 68.

[428] *Id.* at 80.

daries without a like reestablishment of IPS boundaries warranted an interdistrict remedy within Uni-Gov in accordance with *Milliken*."[429] The court of appeals framed the issues for the further proceedings by footnoting this sentence with that portion of Mr. Justice Stewart's concurring opinion from *Milliken* which said,

> Were it to be shown . . . that state officials had contributed to the separation of the races by drawing or redrawing school district lines . . .; or by purposeful, racially discriminatory use of state housing or zoning laws, then a decree calling for transfer of pupils across district lines or for restructuring of district lines might well be appropriate.[430]

The Seventh Circuit also ruled on several less central issues. IPS had appealed from Judge Dillin's August 30, 1973, orders, which held the IPS Board in default for not submitting an acceptable plan, appointed the commissioners to prepare the interim plan, assigned IPS staff to the commissioners, and ordered IPS to apply for federal funds. The Seventh Circuit affirmed Judge Dillin with respect to all four of these issues in a brief section of the opinion.[431] The court of appeals refused to order that Judge Dillin be excused, pursuant to the petition of the state officials, on the grounds that he had, in a newspaper interview, evidenced a prejudgment of liability on the part of the defendants. The Seventh Circuit found that the judge's statements were based on the record of initial trial and were thus derived from proceedings before the court, not on attitudes formed outside the courtroom.[432]

The court of appeals rejected a position raised by the state officials and by the Metropolitan School District of Perry Township Schools that the eleventh amendment barred prosecution of the action " 'in essence against the State of Indiana without the State's consent or waiver of consent.' "[433] The court of appeals said simply "[t]he Eleventh Amendment does not prevent enforcement of the Fourteenth Amendment, which commands that no state shall 'deny to any person within its jurisdiction the equal protection of the laws.' "[434]

The defendant state officials and IPS, along with some of the Marion County suburban schools, petitioned the United States

---

[429] *Id.* at 86 [footnotes omitted].
[430] *Id.* at 86 n.23, *quoting from* 418 U.S. at 755.
[431] 503 F.2d at 75-78.
[432] *Id.* at 80-81.
[433] *Id.* at 82 [footnote omitted].
[434] *Id.* at 82.

Supreme Court for a writ of certiorari to review the court of appeals' decision. Each of these groups of defendants was reacting to a different portion of the decision. IPS was appealing the court of appeals' judgment that IPS had been in default in presenting plans as ordered by the court and that Judge Dillin was justified in appointing the commissioners. IPS also sought certiorari on the order that it apply for federal funds. The state officials—the Governor, the Attorney General and the Superintendent of the Department of Public Instruction—appealed that portion of the judgment in which the Seventh Circuit affirmed Judge Dillin's findings that the state had been guilty of acts of unlawful segregation. The Marion County suburban schools appealed that portion of the decision which ordered further proceedings to be held to determine whether there was a basis for an interdistrict remedy which would include them. Their position was that on the basis of *Milliken,* all suburban schools should have been dismissed from the case, not just the non-Marion County suburban schools. The Supreme Court denied certiorari on all of these petitions.[435]

Following the decision of the Seventh Circuit, the state officials, IPS, and some of the Marion County suburban schools filed a motion with Judge Steckler, the Chief Judge of the Southern District of Indiana, asking that a new judge be appointed to hear the case on remand. The motion was made pursuant to rule 23, Local Rules of the United States Court of Appeals for the Seventh Circuit.[436] Judge Steckler referred the motion to the Seventh Circuit for instruction. On November 14, 1974, the court of appeals denied the motion to have a new judge appointed to the case.

VII. The Second Remedy Trial

A. *Pretrial Conference*

Judge Dillin held a pretrial conference with the lawyers on December 2, 1974. At this conference, Judge Dillin stated a trial would be held to permit all parties to present additional evidence on the issues of whether Uni-Gov, zoning laws, or location of public housing projects by governmental agencies in Marion County con-

[435] 421 U.S. 929 (1975).

[436] 7th Cir. R. 23 provides:

> Whenever a case tried in a district court is hereafter remanded by this court for a new trial, it shall be reassigned by the district court for trial before a judge other than the judge who heard the prior trial unless the remand order directs or all parties request that the same judge retry the case.

stituted a basis for imposing a multidistrict remedy within the county.[437]

Judge Dillin continued his efforts to persuade the parties to settle the case. He related that the suburban schools, in his judgment, had said throughout that they were resisting inclusion in the case because they wanted to maintain local autonomy; they did not want their students bused into the city because the inner-city schools were inferior, but they were not opposed to integrated schools. In response to this position Judge Dillin said, "I have consistently pointed out that if suburban schools would accept 15% new minority students from IPS this would solve the problem, preserve their local autonomy and end this case."[438] The judge said, "It appears that the suburban schools want to hang out on an all or nothing basis."[439] He continued, "If you want to shoot dice with this court, the Seventh Circuit and the Supreme Court, this is your prerogative, but if you wake up some morning and find you are out of existence it is your problem and not mine."[440]

This last statement was a reference to the two possible concepts discussed by Judge Dillin at this pretrial conference.[441] The judge said that among the possible solutions would be for the court to either create a single school district for the entire county or to dissolve the IPS corporation and distribute its territory to the township school corporations. The presence of these two alternatives would seem to have given both IPS and the suburban schools some incentive to consider a settlement. With a single metropolitan district, all of the suburban schools would be eliminated; under the other alternative, IPS would be eliminated.

The desire to obtain a settlement had been consistently pursued by the judge throughout the case and the proposals made at this pretrial conference were not new. They had been made as early as 1971, but had been consistently rejected. In light of the facts that the Supreme Court had just severely restricted the availability of an interdistrict remedy and the Seventh Circuit had set aside such a remedy in this case, at this pretrial conference the suburban schools had a new surge of confidence. The tide had very definitely turned.

---

[437]This author attended the pretrial conference on December 2, 1974, as counsel for the community coalition for schools.

[438]Quotation is taken from the writer's personal notes of the pretrial conference.

[439]*Id.*

[440]*Id.*

[441]These two ideas had been suggested to the Indiana General Assembly as possible solutions in Judge Dillin's opinion of December 6, 1974. 368 F. Supp. at 1227.

One of the lawyers for a suburban school told Judge Dillin the suburban schools were hesitant to accept one-way transfers because of their fear of the court continuing its jurisdiction over the schools to supervise the remedy. This is a sentiment which has been repeatedly voiced in the suburban areas. Judge Dillin severely chastised the assembled lawyers for not "dispelling the paranoid attitude that the court will exercise continuing jurisdiction to alter the plan every year."[442] The judge said that once a final plan was promulgated and implemented the case would be administratively closed and no other adjustments would be made in the absence of bad faith. The judge ordered the intervening plaintiffs to file with the court a statement of issues which they intended to present. He also ordered the United States Government to "decide which side it is on and file a statement accordingly."[443]

B. Second Remedy Trial

The trial to relitigate, as mandated by the court of appeals,[444] the question of whether a legal basis for an interdistrict remedy existed commenced on March 18, 1975. The law with respect to interdistrict remedies was still far from resolved, but it was much clearer in 1975 than it had been two years earlier at the first remedy trial. The focal point of this trial was whether a legal basis for an interdistrict remedy could be found in the Uni-Gov statute, the zoning laws and practices in Marion County, or the location of public housing projects by the Housing Authority of the City of Indianapolis.

The United States was still ambivalent about its position. The attorneys for the Government opened the trial by announcing to the court they had no witnesses to call. Their contribution to the evidence would be four exhibits which were stipulated into evidence.[445]

---

[442]Author's personal notes.

[443]*Id.* At this pretrial conference Judge Dillin ordered all lawyers representing defendants to file with the court a statement of the fees they had received and the basis used for billing their clients. Judge Dillin indicated he needed this information because at a later date he may award attorneys' fees to intervening plaintiffs.

[444]503 F.2d at 80.

[445]The four exhibits were:

1) a list of annexation ordinances passed by the Indianapolis City Council from 1953 to 1969.

2) a map showing the expansion of the civil city of Indianapolis from the creation of the original city to 1969.

3) a list of special fire and police district annexation ordinances for the period of 1970 to 1974.

The intervening plaintiffs presented six witnesses,[446] five[447] of whom had some involvement with Uni-Gov, zoning practices in Marion County, or location of public housing projects.

Some evidence had been developed at the 1973 trial with respect to the Uni-Gov issue, but Judge Dillin had reserved the ruling on the question of whether Uni-Gov provided the legal basis for an interdistrict remedy.[448] Now Judge Dillin encouraged both plaintiffs and defendants to offer additional evidence bearing on that issue.[449] The principal objective of the intervening plaintiffs at this trial was to prove the IPS boundaries were not expanded to conform to the Indianapolis boundaries as a part of Uni-Gov in order to maintain segregated school systems. The intervening plaintiffs were completely unsuccessful in proving discriminatory intent, but the effect of Uni-Gov remained a viable issue.

The intervening plaintiffs called Ray Crowe, a black member of the Indiana House of Representatives, from Marion County. Crowe was a member of the Affairs of Marion County Committee, which considered the Uni-Gov legislation in 1969. Crowe's testimony did not significantly help the case for an interdistrict remedy. He testified on direct examination that "there was some input from representatives from school corporations in Marion County, Indiana . . . ."[450] On examination by a Justice Department attorney, however, Crowe clarified this statement and said, "I

---

4) a map showing the current boundaries of the Indianapolis police and fire service districts.

Index of Exhibits, introduced Mar. 18, 1975. Record, vol. I, at 32-38.

[446]Mr. William Abrams, city planner for the Division of Metropolitan Development. *Id.* at 41; Ray Crowe, formerly a member of the Indiana House of Representatives from district 42 in Marion County. *Id.* at 46; Charles Whistler, former president of the Metropolitan Plan Commission. *Id.* at 53-54; John W. Mullin, assistant director for management of Housing Authority, City of Indianapolis. *Id.* at 69; John Liell, sociologist. *Id.* at 109; Richard G. Lugar, Mayor of the City of Indianapolis. *Id.*, vol. II, at 158.

[447]John Liell was the only witness called by the intervening plaintiffs who did not have direct involvement in any of the three areas. Liell had testified for the intervening plaintiffs at the previous remedy trial.

[448]368 F. Supp. at 1208.

[449]Pretrial conference, December 2, 1974, author's personal notes.

[450]Direct exam, March 18, 1975. Record, vol. I, at 48-49. The intervening plaintiffs' thesis was that schools were excluded from Uni-Gov because of political pressure from citizens' groups and school leaders in suburban Marion County, and that they resisted the inclusion of schools in Uni-Gov because they wanted to keep black students out of the suburban schools. This statement in the evidence is an apparent reference to that thesis.

am positive race did not enter into the discussions or reasons whatsoever."[451]

The intervening plaintiffs called Charles Whistler, former president of the Metropolitan Planning Commission and one of a group of attorneys who participated in drafting the Uni-Gov legislation. Whistler testified that schools were not included in the Uni-Gov bill because of the fact "that schools were independent of civil government, that the people had worked hard to get their schools reorganized, built and developed, and they were proud of them and they didn't want schools to be involved in any way, shape, or form in Uni-Gov."[452] Whistler testified that the section of the Uni-Gov bill which specifically excluded schools from the geographic expansion of the civil city was included only to provide absolute clarity. It was Whistler's opinion that even if the section had not been included in the bill, schools would not have been affected by Uni-Gov.[453]

The star witness of the 2½-day trial was Indianapolis Mayor Richard G. Lugar, who was called by the intervening plaintiffs. Lugar was the mayor when Uni-Gov was enacted and is generally regarded as being the person primarily responsible for obtaining enactment of the legislation. Counsel for the intervening plaintiffs examined Lugar only briefly. The direct examination is contained in ten pages of the trial transcript.[454] Lugar's star billing was misleading. His testimony did not add anything significant to the evidence bearing on the legal impact of Uni-Gov. Lugar testified that the inclusion of schools in the Uni-Gov bill was never seriously considered and in his judgment, if the schools had been included in the bill "it would not have passed."[455]

Judge Dillin was visibly disappointed when the United States and the intervening plaintiffs rested their cases. The judge's words as they appear in the transcript do not fully convey his sentiment.[456] Judge Dillin's reaction is understandable. The trial made no meaningful contribution to the body of evidence which then existed.

---

[451]Cross exam, Mar. 18, 1975. Record, vol. I, at 51.

[452]Direct exam, Mar. 18, 1975. Record, vol. I, at 58.

[453]Cross exam, Mar. 18, 1975. Record, vol. I, at 63-64.

[454]Record, vol. II, at 158-67.

[455]*Id.* at 165.

[456]The transcript shows that the judge said only "[t]hat was brief, indeed." Record, vol. II, at 198. Again near the end of the hearing the judge expressed surprise and dismay at the brief presentation of evidence. *Id.*, vol. III, at 329. The defendants called only two witnesses and the United States, in rebuttal, called two more witnesses. Index of witnesses, record, vol. I, at iv.

C. The Opinion

The trial concluded on March 24, 1975, and the judge gave the parties 10 days to file post-trial briefs. Given the judge's statement at the pretrial conference that he "did not want to get into another summer trial pushed up to a deadline" by school starting,[457] it was anticipated a decision would be forthcoming before summer. However, the decision was not announced until August 1, 1975, approximately one month before school was to reopen. The memorandum of decision did not throughly document all aspects of the ruling as Judge Dillin had done in his two earlier major opinions in the case. Judge Dillin again found that an interdistrict remedy was indicated, this time for all public schools in Marion County.[458] Three legal bases are given, but the rationale of the opinion is somewhat obscure. The judge found that

> the establishment of the Uni-Gov boundaries without a like re-establishment of IPS boundaries, given all of the other facts and circumstances set out in this and former opinions of this Court, warrants a limited interdistrict remedy within all of Marion County, Indiana, as hereafter described.[459]

Judge Dillin said, "When the General Assembly expressly eliminated the schools from consideration under Uni-Gov, it signaled its lack of concern with the whole problem and thus inhibited desegregation [with] IPS."[460]

As the second basis for an interdistrict remedy, Judge Dillin held,

> The evidence is undisputed that each and every public housing project constructed and operated by the added defendant HACI [Housing Authority of the City of Indianapolis] is located within IPS territory, in some instances just across the street from territory served by one of the added defendant school corporations . . . . The residents of said public housing projects are approximately 98% black (except in projects for the elderly), and their children all attend school in IPS. The location of these housing projects by instrumentalities of the State

---

[457]Pretrial conference, December 2, 1974, author's personal notes.

[458]Memorandum of Decision, Aug. 1, 1975.

[459]*Id.* at 5.

[460]*Id.*

of Indiana has obviously tended to cause and to perpetuate the segregation of black pupils in IPS territory.[461]

The third ground for the decision involved the suburbs. Judge Dillin said,

> The evidence in the record, as taken in all hearings, clearly shows that the suburban Marion County units of government, including the added defendant school corporations, have consistently resisted the movement of black citizens or black pupils into their territory. They have resisted school consolidation, they resisted civil annexation so long as civil annexation carried school annexation with it, they ceased resisting civil annexation only when the Uni-Gov act made it clear that the schools would not be involved. Suburban Marion County has resisted the erection of public housing projects outside IPS territory, suburban Marion County officials have refused to cooperate with HUD on the location of such projects, and the customs and usages of both the officials and the inhabitants of such areas has been to discourage blacks from seeking to purchase or rent homes therein, all as shown in detail in previous opinions of this Court.[462]

Based on these findings, Judge Dillin ordered black students from IPS grades one through nine transferred to each of the suburban school districts in such numbers as would cause the total enrollment of pupils in each suburban school to be approximately 15 percent black after the transfers. Washington Township schools, which would have a black enrollment of approximately 15 percent, and Pike Township schools, which would have a black enrollment of approximately 12 percent, were excluded from the plan. All other suburban school defendants were ordered to accept the transfers for the 1975-76 school year and each year thereafter. Once transferred to a suburban school, a student would continue to attend that school until graduation from high school unless the student moved out of IPS territory.[463]

The opinion indicated the order would require transferring 6,533 students in grades 1 through 9 to suburban schools for the fall of 1975.[464] The number of transfers would increase for each of the next 4 years as the transfer of high school students commenced

---

[461] *Id.* at 2-3.

[462] *Id.* at 3.

[463] *Id.* at 9-11.

[464] *Id.* at 9.

until approximately 9,525 black students would be transferred to the suburban school districts.[465]

The court ordered IPS to submit, on or before October 15, 1975, a final plan for desegregation of the remaining IPS schools. The opinion suggested that if the plan were approved, it would be put into effect at the beginning of the second semester of the 1975-76 school year.[466]

Since Judge Dillin has stayed the ordering of a transfer of IPS students to suburban schools in August of 1973, it was widely assumed he would do so again. He again surprised the speculators. Immediately after entering the order Judge Dillin left Indianapolis to attend the ABA convention in Montreal. A motion for a stay was immediately filed with Judge William E. Steckler. On August 8, 1975, Judge Steckler, reportedly after consultation with Judge Dillin in Canada,[467] denied the motion for a stay. On the same day, Judge Steckler granted a renewed petition to intervene filed by the Indiana State Teachers Association.[468] The defendant schools immediately sought and obtained a stay of the implementation of the order from the United States Court of Appeals for the Seventh Circuit.[469]

VIII. Court of Appeals Affirms the Interdistrict Remedy

On July 16, 1976, a divided United States Court of Appeals for the Seventh Circuit affirmed the interdistrict remedy ordered by Judge Dillin on August 1, 1975.[470] The court held that on the principles of *Milliken v. Bradley*[471] the interdistrict remedy ordered by Judge Dillin was legally permissible.

The court concluded that the exclusion of the public schools from the territorial expansion of Uni-Gov constituted an inter-

---

[465] *Id.*

[466] *Id.* at 10-11.

[467] News, Aug. 9, 1975, at 1, col. 1.

[468] Order, Aug. 8, 1975.

[469] On August 22, 1975, the court of appeals ordered that the implementation of the plan be stayed.

[470] United States v. Board of School Comm'rs, No. IP-68-C-225 (7th Cir., July 16, 1976). The court of appeals action came just 15 days less than one year after the district court's decision. In a footnote to his opinion Judge Tone, the dissenter, attributes the delay to the fact Tone initially voted to affirm and was assigned to write the opinion. During the preparation of the opinion Judge Tone "came to the view reflected in this dissent." The opinion was reassigned to Judge Swygert, who along with Chief Judge Fairchild voted to affirm Judge Dillin's opinion. *Id.* at 24.

[471] 418 U.S. 717 (1974).

district violation which justified an interdistrict remedy. Uni-Gov and its companion legislation[472] which repealed the law automatically extending school district boundaries upon expansion of the civil city, "had an obvious racial segregative impact."[473] The court said,

> Because, in 1969, 95 percent of the blacks in Marion County lived in the inner city and segregation in its schools was under attack in federal court, it is clear to us that Uni-Gov and its companion 1969 legislation were "[A] substantial cause of interdistrict segregation." *Milliken v. Bradley*, 418 U.S. 717, 745 (1974), and "[C]ontributed to the separation of the races by . . . redrawing school district lines. . . ." *Id.* at 755 (Stewart, J., concurring).[474]

The analysis of the court of appeals seems to hold that since the Uni-Gov package had an "obvious racial segregative impact,"[475] the exclusion of IPS schools from Uni-Gov would *not* be an interdistrict violation only if there were a "compelling state interest that would have justified the failure to include IPS in the Uni-Gov legislation."[476] Given the segregative effect, the court held, the absence of racial motivation does not preclude a finding of an interdistrict violation.

The court suggests throughout the opinion that the actions of the Housing Authority of the City of Indianapolis in locating all public housing (the occupancy of which is 98 percent black) within the boundaries of IPS constituted an interdistrict violation. Judge Dillin found this action to be an interdistrict violation within the principles of *Milliken*. Despite all the discussion of the housing issue the court of appeals seems to affirm the interdistrict remedy solely on the Uni-Gov issue and not on the basis of the location of public housing. The court's discussion of the public housing issue is in support of the court's affirmance of Judge Dillin's injunction against the building of any additional public housing projects within IPS.[477]

The court concludes its opinion by "suggesting" that "the court [Judge Dillin] monitor the transference of black pupils from IPS to other school districts periodically, perhaps on a yearly

---

[472]Chapter 52, 1969 Acts.

[473]No. IP-68-C-225 (7th Cir., July 16, 1976), at 18.

[474]*Id.* at 17.

[475]*Id.* at 18.

[476]*Id.* at 22.

[477]*Id.* at 24.

basis, in order that modifications, if necessary, may be made."[478] As is discussed earlier in this paper annual modifications of a plan have been a frequently expressed fear of suburban school officials and their lawyers. Judge Dillin partially allayed those fears when he told the lawyers at the pretrial conference on December 2, 1974, that he did not intend to "exercise continuing jurisdiction to alter the plan every year."[479] Judge Swygert's opinion will likely rekindle these fears.[480]

On August 20, 1976, Mr. Justice Stevens granted the suburban schools a stay of the interdistrict portion of Judge Dillin's August 1, 1975, order pending possible review by the United States Supreme Court.[481] The stay granted by Justice Stevens likely eliminates the possibility of any further desegregation of Marion County schools before the 1977-78 academic year.

VIII. Conclusion & Commentary

The racial composition of schools in Marion County has been in continuous litigation for eight years and the termination of the case is not in sight. This study is an interim report but several general observations can be made about the first eight years of the litigation.

It is generally overlooked today that one of the original objectives has been achieved. When the United States Department of Justice filed the complaint on May 21, 1968, the faculties of IPS schools were racially identifiable. Within the first two years of the case this defect was voluntarily changed by IPS. The case has thus accomplished the first significant step toward a unitary school system. This result was accomplished early in the litigation because the IPS Board recognized its legal responsibility and was politically able to act accordingly. The faculties were not, however, desegregated until after the case was filed.

From this writer's perspective the most significant aspect to date in the ongoing contested litigation is its poignant demonstration of the impact of an independent federal judiciary. Judge Dillin has stubbornly persevered in applying the law as he understands it. The hundreds of hours of research and investigation which this writer has spent preparing this study did not produce a single bit of evidence that Judge Dillin ever paid any heed

---

[478] *Id.*

[479] See note 383 *supra.*

[480] At the pretrial conference Judge Dillin characterized these fears as a "paranoid attitude."

[481] Metropolitan School District of Perry Twp. v. Buckley, No. 76-212 (U.S., Aug. 20, 1976).

to public opinion. This observation comes in a case in which the public opinion is very visible and emotionally charged. Most people in Indianapolis have always been opposed to the judge's approach to the case and there have been times when Judge Dillin did not have the support of any recognizable segment of the community. From the time Judge Dillin found IPS to be unlawfully segregated on August 18, 1971, he has pursued the course of most pronounced resistance. Undoubtedly this has come only at great personal sacrifice. The persistent, critical, sometimes personal commentary from politicians and newspapers for nearly five years has not had any discernible impact on the judge.

This writer is convinced that Judge Dillin's handling of the case is not a result of a desire to control the public school systems in Marion County, as has been charged frequently. From the outset of the remedy portion of the case Judge Dillin has urged, pleaded and practically begged the school corporations to voluntarily resolve the problem. Judge Dillin has repeatedly assured the suburban schools that if an acceptable voluntary plan were presented the case would be closed like any other civil lawsuit which had been settled. Fears of continued oversight of a plan and year-to-year adjustment have had no basis in fact. At times Judge Dillin seemed to be begging for a way to get rid of the case. Unfortunately, the only effect of the efforts seemed to be to strengthen the resolve of the defendants.

In addition, Judge Dillin consistently encouraged the State of Indiana to assume responsibility for the problem. Judge Dillin paid all due respect to principles of comity, but the State of Indiana declined the invitation. State officials, in both the legislative and executive branches, do not have life tenure and they flatly refused to get involved.

These observations are not judgmental. Some will say these facts demonstrated the strength of an independent federal judiciary. Others will say these facts present a solid case for a constitutional change regarding the life tenure of federal judges.

The protracted nature of the case has resulted in some benefits. Public acceptance of increased integration, or at least a less vocal opposition, has significantly increased in Indianapolis since 1968.

Possibly the most widespread resistance came in 1971 when the first court-ordered busing occurred. Judge Dillin ordered IPS to take action to stabilize the racial balance in schools approaching the 40 percent tipping point. IPS reassigned less than 1,000 elementary students and 900 ninth- and tenth-grade students were assigned to previously all-black Crispus Attucks High School. Not

even all of these students were bused, but this action incurred the wrath of the public. The adverse reaction was no greater in 1973 when the interim desegregation plan resulted in 9,300 students being reassigned, 80 percent of them being bused. Finally in 1975, when Judge Dillin ordered another 6,500 students bused to suburban schools, to be followed by more reassignments within IPS, this writer sensed that the resistance was somewhat more temperate. The 1975 experience is, of course, distinguishable from the earlier episodes in that the order was stayed before any students were bused.

The advantages resulting from the delays were not, however, maximized by Judge Dillin. The reassignments which came every two years could have easily been made an annual event. This could have been accomplished by requiring strict compliance with the 1971 order that schools nearing the 40 percent tipping point be stabilized. Many schools which were near the 40 percent tipping point in 1971 are predominately black in 1976.

Another chance to utilize delay was lost in 1975. After the United States Court of Appeals stayed the interdistrict portion of the August 1, 1975, order, IPS asked for and was given a stay from Judge Dillin's order that IPS prepare a plan for the desegregation of the remainder of IPS. Even if it were necessary to forestall any action until the appeals were resolved, the preparation of alternative plans, as was done in 1973, would have been desirable. To date parents and community groups have been given no opportunity to respond to a proposed plan before its implementation. If the August 1, 1975, order were not stayed as to proposal of a plan by IPS, the plans could have been scrutinized by the community during the pendency of the appeals. Instead, that period of nearly a year has been spent waiting. If past experience is a guide, the time for promulgation and implementation of a plan, following the appeals, will be so short there again will not be time for public scrutiny. The desired public scrutiny being discussed here is not the same as the public opinion referred to earlier in this article. Even though Judge Dillin is not concerned with public opinion it is believed that he should recognize and consider specific, reasoned comments from community sources regarding *details* of a proposed plan. This is possible only if a proposed plan is submitted far enough in advance of the desired implementation date to permit public scrutiny.

In the May 1976 school board election, for the first time since its inception in 1930 the Citizens School Committee slate of candidates (running in 1976 under the banner of the Citizens for Neighborhood Schools) was defeated in its entirety by a more

progressive slate of candidates. Four of the newly-elected board members assumed office on July 1, 1976. Mary Busch, one of the new board members, was elected president of the board. One of the first acts of the new board members was the approval of a highly symbolic resolution favoring the establishment of the birthday of Dr. Martin Luther King, Jr. as a school holiday. The change in membership of the IPS board could result in a major realignment of forces in the case and will likely result in a drastically different leadership approach to implementing whatever plan is ultimately approved by the courts.

Many unknown factors will play an important role in the ultimate outcome of this long, tedious litigation. The most notable future decisions affecting the case will be the judgment of the Supreme Court of the United States as to whether to review the case and its decision in the event a review is undertaken, and the decision of the voters on November 2, 1976, as to whether Gerald Ford or Jimmy Carter will provide the national leadership for the next four years. Any prediction pending these two determinations would be pure folly.